Law relating to

P R E V E N T I V E D E T E N T I O N

in Pakistan

By

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ABSTRACT

The thesis deals with the law relating to preventive detention in Pakistan. It is an extraordinary law which empowers the executive to deprive citizens of their liberty without trial in regular court of law. Legislative powers may, under the constitution, be used in the interest of the state for reasons connected with defence, security, maintenance of public order and internal peace. The chapters on fundamental rights in the Constitutions of 1956 and 1962 place restrictions on these powers. The evolution of fundamental rights from the time of the British Raj are discussed in detail, and after a general discussion of fundamental rights, the thesis deals with the demands made by various political parties for their incorporation in the Indian constitution to be made by Parliament at Westminster. The All Party Report, The Simon Commission Report, The Round Table Conference Report and report of The Joint Parliamentary Committee on Indian Constitutional reform are dealt with in this Chapter I, along with the abrogation of the two constitutions of Pakistan. In Chapter II, the history of preventive detention has been traced from 1773 with Bengal State Prisoners Regulations of 1818 and 1850, the Criminal

Law Amendment Acts, 1908, 1915, the Sedition Report, 1918, the Rowlatt Act, 1919, and the Defence of India Act, 1939. The necessity for preventive detention is discussed in Chapter III; after a general consideration, such provisions in England and America in time of war are discussed. Chapter IV discusses the nature of preventive detention laws and the constitutional restrictions on them.

Chapter V discusses judicial review and the jurisdiction of the High Courts to set aside detention orders when there is any irregularity or the order is made mala fide. Chapter VI deals with the detaining authority, the nature and reasonableness of its satisfaction to pass detention orders. The justification of preventive detention is discussed in Chapter VII, in which the situation in Pakistan is outlined; alternative remedies have been discussed to show how far they are inadequate to meet the needs of the country. The next two chapters deal with the constitutional remedies for loss of personal liberty, in which the writ procedure in England and Pakistan is discussed in detail, as well as Article 2 of Constitution of Pakistan, 1962.

In the last Chapter some conclusions have been drawn from the research and some suggestions have been made.

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ABBREVIATIONS

A.C.	Appeal Cases (Privy Council).
A.I.R.	All India Reporter.
All E.R. or A.E.R ..	All England Reporter.
All.	Allahabad.
Art.	Article.
B.L.R.	Burma Law Reports.
Bal.	Baluchistan.
Ben.L.R.. ..	Bengal Law Reports.
Bom.L.R.. ..	Bombay Law Reporter.
C.C.C.	Canadian Criminal Cases.
C.L.R.	Commonwealth Law Reports. (Australia).
Cal.	Calcutta.
Ch.D.	Chancery Division.
Cl.	Clause.
Cut.	Cuttack.
Cr.P.C... ..	Criminal Procedure Code.
C.W.N.	Calcutta Weekly Notes.
F.B.	Full Bench.
F.C.	Federal Court.
F.C.R.	Federal Court Reports.

F.C.R.	.. ..	Frontier Crimes Regulations.
H.L.C.	.. ..	House of Lords Cases
Hydr.	.. ..	Hyderabad.
I.A.	.. ..	Indian Appeals. (Privy Council).
I.L.R.	.. ..	Indian Law Reports.
K.B.D.	.. ..	King's Bench Division.
Kar.	.. ..	Karachi.
L.J.	.. ..	Law Journal.
L.R.	.. ..	Law Reports.
Lah.	.. ..	Lahore.
M.L.R.	.. ..	Martial Law Regulations.
Mad.	.. ..	Madras.
Nag.	.. ..	Nagpur.
P.C.	.. ..	Privy Council.
P.L.D.	.. ..	Pakistan Legal Decisions.
P.L.R.	.. ..	Pakistan Law Reports.
P.P.C.	.. ..	Pakistan Penal Code.
Pak.	.. ..	Pakistan.
Pat.	.. ..	Patna.
Pesh.	.. ..	Peshawar.
Q.B.D.	.. ..	Queen's Bench Division.
Quet.	.. ..	Quetta.
Raj.	.. ...	Rajasthan.

S.C.	Supreme Court.
S.C.J.	Supreme Court Journal.
S.C.N.	Supreme Court Notes.
S.C.R.	Supreme Court Reports.
S.T.	State Trials.
Sec.	Section.
Stat.	Statute.
T.L.R.	Times Law Reports.
U.S.	United States. (Supreme Court).
W.P.	West Pakistan.
Wall.	Wallace's Reports.(Supreme Court).
Wheat.	Wheaton's Reports. (Supreme Court).

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CHAPTER I

Introduction :-

On the 14th August, 1947, a momentous change took place in the history of India, as Pakistan emerged as an independent State under the leadership of Quaid-E-Azam Muhammad Ali Jinnah. Soon after the establishment of Pakistan, the Constituent Assembly was constituted to frame a constitution for the country. Most of the people had thought that the "Black Laws"(1) of the British Raj would be repealed and the right to personal liberty, among other fundamental rights, for which the people had made sacrifices, would be enjoyed by all citizens of Pakistan. But this assumption proved to be false; the laws passed during the British rule, imposing restrictions on the liberty of the person, were retained and no express declaration of Fundamental Rights was made; the country was still governed by the Government of India Act, 1935, which did not guarantee fundamental rights.

The first Constituent Assembly was dissolved on 24th October, 1954, after seven years, as it was unable to

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(1) Common name given to preventive detention laws during struggle for independence.

provide the country with an acceptable constitution, due to lack of agreement between the members. The Second Constituent Assembly ultimately gave the country a constitution, based on the British Parliamentary system. This Constitution of 1956 had a declaration of Fundamental Rights, enforceable in the Courts, mostly subject to reasonable restrictions. The provisions directed to protection against arrest and detention permitted the legislature to deprive a citizen of his liberty on the subjective satisfaction of executive officials without trial.

This Constitution of 1956 was abrogated after two and a half years. The Martial Law regime, which abrogated this constitution, gave the country a new Constitution in 1962, which again led to the imposition of Martial Law and abrogation of this new constitution. Throughout this period the preventive legislation was of course retained, for reasons connected with defence, security of the State and maintenance of public order. These measures are precautionary and not punitive; the detenu is not charged with any crime and the object is to prevent the individual from acting in a particular manner so as to prevent him achieving an object, which may be dangerous to the State and its citizens. The justification for such legislation

is based on the argument that it was not wise to allow people to commit crimes against the state and its citizens and punish them heavily for it, when the mischief can be prevented by taking the action against the agitator under the powers conferred on the executive by the preventive detention laws. Preventive Detention, in its modern form, owes its genesis largely to the First World War, when it was thought that no act or deed could possibly be permitted that would tend to hamper the successful prosecution of the war. Effectiveness lay in prevention and not in punishment.

The countries of the world have sought to keep a balance between the competing claims of liberty and state control in different ways. The Constitution of Pakistan, following the example of other democratic countries, enacted a list of fundamental rights relating to life, liberty, property and other rights of citizens. But it allowed power to be given by law to deprive a person of his liberty without trial in a regular court, in certain circumstances.

It is a controversial question whether we really need this sort of legislation in peace time. Opposition parties have always maintained that the executive always pleads emergencies, real, supposed or imaginary, as the excuse for its demands for arbitrary powers. The long habit of

not thinking such things wrong gives them a superficial appearance of being right. Encroachment on liberties is generally resented, but if the repression continues, the people get accustomed to it. The opposition thinks that the object of preventive detention legislation is to keep the ruling party in power; it is abused and followed by a demand for absolute power. But the courts are there to see that the power is not abused and used only for such purposes as the Constitution and the laws enacted under it contemplate. Pakistan has often been criticised for having such legislation during peace time, but, apart from Latin America, Belgium, France and some communist countries, all the territories, which had been British Colonies have this sort of legislation during peace time.

I have selected preventive detention as the subject of my thesis, not because I approve of such legislation in its present form but because it is a matter of special interest to the student of law to see how the courts try to keep a proper balance between the liberties of the subject on the one hand and needs of the state on the other hand. The thesis begins with a discussion of the fundamental rights in constitutions of 1956 and 1962; it has been held that "the very essence of a fundamental right is that it is more or less permanent and cannot be changed like the

ordinary law."[1] The evolution of Fundamental Rights has been traced from the time, when the British Government took over the administration of India. Reference has been made to The All Party Report, 1928, the Simon Commission Report (1930), the report of the Joint Parliamentary Committee on Indian Constitutional Reform (1933-34) to show how demands were made for fundamental rights and the way these demands were rejected. It was mentioned in the Simon Commission Report (1930) that, "We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the war. Experience however has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and means to make them effective." Eventually however the Government of India Act, 1935, included section 298, which declared that no person should be subjected to disability by reason of race, religion, etc., and section 299 which conferred property rights on the citizens. The Fundamental rights in Pakistan and the fate of the two Constitutions of Pakistan will be discussed in detail.

The history of Preventive Detention will be traced from the East India Company Act, 1778, which was passed by

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(1) The State v. Dosso, P.L.D.1958 S.C.533, Munir, C.J.

the British Parliament and was made applicable to India. The necessity for Preventive Detention will be discussed in detail; it was introduced in India by the executive in order to maintain peace and order, so that liberty could flourish in an orderly society and to combat subversive movements and abuse of personal liberty; such legislation has been retained in our statute books as a matter of evil necessity. As President Nyerere said,(1)

"While the vast mass of the people give full and active support to their country and its government, a handful of individuals can still put our nation in jeopardy and reduce to ashes the effort of millions."

"Personal freedom" says Denning, "is the freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasions, without let or hindrance from any other person."(2) It is one of the most cherished objects of life and this principle is embodied in our constitution that, "No person shall be deprived of life and liberty save in accordance with law."(3) The Constitution of Pakistan, 1962, uses the words 'in

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(1) Chief of State, Tanzania, Speech inaugurating the University College, Dar-es-Salam, 1964.

(2) Sir Alfred Denning, Freedom under the law, 1949, London.

(3) Right No.1 Constitution of Pakistan, 1962.

accordance with law,' which is a substitute for 'due process of law,' though the scope is limited. "Law" in this context has been held to connote comprehensible and intelligible laws[1] and is used in its generic sense as connoting all that is treated as law in this country, including even the judicial principles laid down from time to time by the Superior Courts.[2]

Right No.2 of the Constitution of Pakistan, 1962, embodies the safeguards which are available to a person arrested under the ordinary criminal law but an exception is made to this right in the case of a person detained under a law providing for preventive detention. He is given certain other safeguards. The detenu is not entitled to have the services of a lawyer, nor can he claim to be produced before the nearest magistrate within 24 hours of his arrest; he can be detained beyond the period of 24 hours without the authority of the magistrate. On the other hand he has a right to be informed of the ground of his detention as soon as may be, and to make

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(1) Haji Ghulam Zamin v. Khondhar, P.L.D.1965 Dacca 156.

(2) Government of Pakistan v. Begum Agha Shorish Kashmari, P.L.D.69 S.C.14.

representation against the order of detention to the authorities. The detenu cannot be detained beyond three months without the concurrence of Advisory Board.

The term "Preventive Detention" has been in use to describe detention by order of an authority, empowered by a statute, on his subjective satisfaction that the person detained is likely to act in a manner prejudicial to one or more of the matters described in the statute, such as national defence or public order. Normally the authority acts on information supplied by the police or other public authority without taking any evidence.(1) It proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable, he would do; it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof.(2)

Denning observed in his book that, "Where there is any conflict between the freedom of the individual and any other right or interest, then no matter how great or powerful those others may be, the freedom of the humblest citizen should prevail over it."(3) But it is necessary, in times

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(1) Alan Gledhill; Pakistan, The Development of its Laws and Constitutions.

(2) Rex v. Halliday 1917 A.C.260.

(3) Sir Alfred Denning, Freedom under the Law 1949, London.

of emergency, political crisis and during normal times in the interest of society and to control disruptive elements in the society, to detain certain persons. A balance between all these conflicting interests is the aim of the law and the courts have been empowered to see that the balance is maintained and the State does not take undue advantage of it. Although the Courts have never looked at the "Preventive Detention" with respect and have always criticised it on the ground that it derogates from the rule of law, they have never declared such legislation ultra vires. What the Court has done is to insist on full compliance with the safeguards available to the detenu. Whenever there has been a slight irregularity in the procedure, the Courts have set free the detenu. The constitution of the Advisory Board was held to be improper, when an officer, who had dealt with the case of detention on behalf of the Government, was nominated as a member of the Board by the Government, as no one can be judge of his own cause.(1) All these matters are discussed in detail in the chapter on the nature of, and constitutional restrictions on preventive detention laws.

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(1) Rehmat Ellahi v. Government of West Pakistan, P.L.D.1965 Lah.112.

The next chapter deals with judicial review, and discusses the cases where the court has acted under the constitutional provisions, which enable the court to hear complaints of detenu and, when necessary, strike down the orders of detention on the ground of irregularity, or substantial defect in the executive action. The Advisory Board is an advisory body, whose function is to advise the Government whether, in its opinion, there is a sufficient cause for the detention of a particular person beyond three months. It does not make the detention valid, if the order is ultra vires the constitution or mala fide.

The detenu has a right to be informed of the grounds of his detention to enable him to make representation against the order. The detention has been held to be illegal where the grounds were either non-existent, vague, irrelevant or even if one of the several grounds supplied to the detenu be either irrelevant or vague or non-existent. The High Court has struck down the order, if the order was mala fide. Though the Constitution does not lay down any obligation to give 'particulars or details' of the grounds and leaves it to the discretion of the detaining authority to disclose or withhold facts, but a mere recital of the clauses of the statute, without giving any particulars, is not sufficient, for, without particulars, it is not possible to make a

representation, which is the very object of communicating the grounds. The particulars are to be furnished without unreasonable delay. The chapter dealing with the detaining authority is important as it deals with the satisfaction of the detaining authority, its nature and the right of the detenu to challenge it before the Court. It discusses questions of fundamental importance; many legal battles have been fought over the satisfaction clause in the various statutes. The satisfaction of the detaining authority may be based on past activities of the detenu, if such activity, in the opinion of the detaining authority, gives rise to the apprehension of prejudicial conduct in the future or his past objectionable activities have a relation to the existing situation. The fact that the detenu has been in jail since he indulged in activities giving rise to such apprehension is in itself, no bar to action under the preventive detention law, if the detaining authority is satisfied, having regard to the past activities, that the intended detenu is likely to indulge in prejudicial activities on his release.

Until recently, the Courts of Pakistan have followed the view of the majority in Liversidge's case[1] in preventive

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(1) Liversidge v. Anderson, 1942 A.C.206.

detention cases that the "Home Secretary's satisfaction was not subject to review by the court." If we look at the decision of the majority in this case, it is apparent that it was decided during World War II and this ruling will hold good when there is grave emergency like war, but, during peace time, it will not be wise to follow it. In the afore mentioned case, the views expressed by the dissenting judge, Lord Atkin, will hold good; he said in the instant case that the Court should not act as a Court of Appeal in this matter, but should deal with it in the same way as arrest by a police officer empowered to arrest a person reasonably suspected of being concerned in the commission of an offence; the question for determination would be whether a reasonable man, in the circumstances, would have made the arrest.

The Supreme Court of Pakistan in 1967, declined to follow the majority in Liversidge's case and accepted the view of Lord Atkin, which other Law Lords had said would be applicable to peace time legislation. So in Ghulam Jilani's case[1], the Supreme Court of Pakistan considered the question of judicial review of detention orders made under the Defence of Pakistan Rules (1965) and held, per Cornelius, C.J: "That a mere declaration of executive 'satisfaction' .

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(1) Ghulam Jilani v. Government of West Pakistan, P.L.D. 1967 S.C.373.

is not sufficient to justify detention. The existence of 'reasonable grounds,' though not expressly required by the relevant rule, is essential", for detention on unreasonable grounds is prima facie, mala fide. The Court also held "It was the function of the judiciary to ascertain the existence of reasonable grounds. It is too late to rely on the dictum in English case of Liversidge for the purpose of investing the detaining authority with complete power to be the judge of its own satisfaction." In arriving at this conclusion, the court found support in Article 2 of the Constitution which requires every citizen to be treated in accordance with law and Article 98 which the court construed as conferring power on a superior court to examine every exercise of executive power and ensure that it was done with lawful authority.

It is the right of the detenu to be informed of the grounds of his detention "as soon as may be" and to make representation against the order. The words "as soon as may be" in this context have been interpreted to mean that the grounds must be served with the least possible delay and 24 hours has been considered as normally the maximum period within which the grounds must be served.(1)

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(1) Ghulam Ullah Khan v. District Magistrate, P.L.D.1967 Pesh. 195.

Keeping in view the circumstances of each case, the question whether this has been done is clearly a matter open to judicial review.(1)

The purpose of requiring the detenu to be furnished with grounds and particulars is to enable him to make a representation against the order of detention and that purpose cannot be served unless the detenu knows what exactly had moved the Government to deprive him of his liberty. The court can order the release of a detenu if the grounds of detention are too vague or indefinite to enable him to make a representation. The right to make a representation does not carry with it the right to an oral hearing or engage lawyer; he may present a petition to the appropriate executive authority.

The authority making the order of detention has been given the discretion not to disclose facts, which the authority considers to be against the public interest to disclose. Although this discretionary power of the executive has been upheld by the courts, the abuse of this power has been a subject of criticism.

Munir C.J. criticised the attitude of executive in the

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(1) Muhammad Aslam Malik v. Province of West Pakistan, P.L.D. 1968 Lah. 1324.

following words,

"In almost every case of detention, the detaining authority, when questioned by the Court about the reasons for detention, mechanically repeated the formula of "public safety and maintenance of public order" and displays a positive disinclination to the matter being probed further. While such disinclination is understandable, where high affairs of State are concerned, there is no reason why, in ordinary cases, as for instance where a man is arrested for defying law and order, the authority ordering the arrest should not take the Court and the public into its confidence, by giving a broad hint about the reasons for the action taken."(1)

The justification for preventive legislation during war time is well recognised. As has been observed by His Lordship Lord Macmillan, "The liberty, which we so justly extol, is itself the gift of law and, as Magna Carta recognizes, may by the law be forfeited or abridged. At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possess for his country's cause, it may well be no matter for surprise that there

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(1) Inayat Ullah Khan Mashriqi v. Crown, P.L.D.1952 Lah.331

should be confided to the Secretary of State a discretionary power of enforcing the relative mild precaution of detention."(1) The justification for such legislation during peace time in Pakistan is that the conditions in the Republic require such a law to put down the unlawful and subversive activities of certain groups of persons, whose action appears to be directed against the security of state and maintenance of public order. Moreover democracy in our country needs to be guarded more carefully than in the western countries, which are without such legislation during the peace time, as those countries have a long history of established democratic government. The alternative remedies, provisions contained in the Criminal Procedure Code and Pakistan Penal Code, with their judicial safeguards are inadequate and they cannot serve the purpose which the Preventive Detention legislation can achieve. Moreover the criminal codes are founded upon the principle that a man is innocent until proved guilty. The law of Preventive Detention is free from legal technicalities and a man can be detained in the interest of the security, defence or the maintenance of peace and order without strict judicial evidence. Moreover the existence of so many political parties, with conflicting ideologies and no agreement between their leaders, may further justify the need for preventive detention.

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(1) Liversidge v. Anderson, 1942 A.C. Page 257.

Though preventive detention can be imposed without trial in a court of law, it is subject to the power of the High Court to issue an order of Habeas Corpus, unless it too is suspended or taken away by law. The major difference between the Law of Preventive Detention, before the introduction of Criminal Procedure Code in 1882, was, as Norman, J. observed,(1) that the Bengal Regulation, 1818, was a "permanent suspension of habeas corpus." But the detenu had the right to make a representation in his defence. After the introduction of Criminal Procedure Code, under section 491 a detenu had a right to pray for habeas corpus, which right is still available to the detenu in Pakistan, but not if he is detained under the Bengal State Prisoner Regulation, 1818, or the Bombay Regulation XXV of 1827, the State Prisoners Act, 1850, the State Prisoner Act, 1858, or the Security of Pakistan Act, 1952.

Article 98 of the 1962 Constitution of Pakistan confers powers on the High Courts to issue orders in the nature of habeas corpus in cases of illegal and improper detention and this is applicable as a remedy in all cases of wrongful deprivation of personal liberty. This constitutional

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(1) In the matter of Ameer Khan, (1870) 6 Ben.L.R. 392

provision is of higher authority than sec.491 of the Code of Criminal Procedure and is not subject to the restriction imposed by sub-section (3) of section 491 of Criminal Procedure Code or the provisions of any other law. The writ is one of right, but not of course, and issues only on reasonable cause shown. It is of a remedial nature and is not used as an instrument of punishment.

"Power is expressly given by Article 98 to the Superior Court to probe into the exercise of public power by executive authority, how high soever, to determine whether they have acted with lawful authority. The judicial power is reduced to a nullity, if laws are so worded or interpreted that the executive authority may make what statutory rules it pleases thereunder and may use this freedom to make themselves the final judges of their own satisfaction for imposing restraints on the enjoyment of the fundamental rights of citizens."(1)

The essential condition precedent to the issue of the writ under Article 98 is that High Court should be satisfied that no other adequate remedy is provided by law, but when

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(1) Ghulam Jilani v. Govt. of West Pakistan, P.L.D.1967 S.C.373.

the liberty of a person is involved, the question of adequate remedy does not come into play.(1) All these remedies, which are available to the person who has been deprived of his liberty, are discussed in the chapter on habeas corpus.

The Constitution of 1962 speaks of "orders" and omits the word "writ." Cornelius C.J. said that, though the ancient names had been eliminated in the new constitution, they would be used in judgments to distinguish the various categories.(2) The West Pakistan High Court has said that whereas, under the Constitution of 1956, the court had to gather the scope of the named writs from textbooks and cases, the Constitution of 1962 attempts to reduce the substance of the writs into self contained propositions.

In the last chapter I have drawn some conclusions based on the results of my research. I have been unable to cite a large number of Pakistani cases, because Pakistanis

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(1) Muhammad Hossain v. General Manager E.B.Rly., P.L.D. 1961 Dacca 730.

(2) P.L.D. 1964 Journal 73.

(3) Mahboob Ali Malik v. W.Pakistan, P.L.D.1963 Lah.575.

only enjoyed the protection of the Fundamental Rights while the Constitution of 1956 was in force until 1958 and subsequently from the enactment of Constitution (First Amendment) Act, 1963, until they were abrogated on 25th March, 1969. During these short periods we have been unable to build up a body of case law or as Prof. Alan Gledhill has said, we do not seem to have the same enthusiasm for litigation in this field as Indians.(1) In the light of these facts it has often been necessary to rely on foreign cases.

Finally I would like to point out that, as preventive detention legislation is in operation in South Africa and Rhodesia to suppress the black majority and, for which these countries have been condemned by the rest of the world, it is a pity that such legislation is being enforced in India-held Kashmir, to suppress the Muslim majority, and nobody seems to have commented on it. The law providing for Preventive Detention in India-held Kashmir differs from the Indian Preventive Detention Act, 1950, which is applicable in the rest of India.

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(1) Alan Gledhill, Fundamental Rights in Pakistan, Journal of the Indian Law Institute, Jan-June, 1965.

The three important differences are:-

(I) The cases of persons detained in the interest of the security of the State and for the maintenance of public order are not referred to an Advisory Board, if detention is to continue beyond three months.

(II) When a person is detained in the interest of the State, grounds need not be communicated to the detenu.

(iii) The maximum period of detention in all categories of cases is ten years from the date of detention.

Fundamental Rights in General

Apart from the Universal Declaration of Human Rights in 1948, almost all the written constitutions promulgated after Hitler's war have adopted a declaration of Fundamental Rights. These rights vary from country to country, depending upon their political conditions but the rights most worthy of mention are the right to personal liberty, freedom of movement, assembly, association, expression, freedom to choose one's avocation, freedom of religion, the right to property, equality before the law and protection against retroactive penal legislation.

Fundamental rights are those rights which can be claimed by the individual, as citizen of a free and civilised community; they belong alike to every man, woman and child.(1) These rights are protected and guaranteed by the written constitutions and differ from the ordinary rights in the sense that, while the latter may be enlarged, abridged or destroyed by legislation in its ordinary process, the former rights, being generally guaranteed by the constitution, cannot be altered, taken away, suspended or abridged, except to the extent allowed by the Constitution,

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(1) State v. Williams, 68 COM.131, 35 A24, 421, 48 L.R.A.465: re North Perth 21 ONT. 538.

which usually puts it beyond the power of any organ of the State, whether executive or legislative, to act in violation of them. The aim of having a declaration of fundamental rights in the Constitution is to place them beyond the reach of a majority in a legislature and the executive; they are thus limitations on the power of government, and are usually protected by the judicial authority.

In Citizen's Savings and Loan Association v. Topeka[1], Miller, J., said "It must be conceded that there are such rights in every free government, beyond the control of the State. A government which recognised no such rights, which held the lives, the liberty and the property of it's citizens, subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the majority, if you choose to call it so, but is none the less despotism." Emphasizing the merits of having a declaration of fundamental rights in the United States Constitution, Justice Jackson observed, "The very purpose of a Bill of Rights is to withdraw certain subjects from the vicissitudes of political controversy, to place

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(1) (1874) 20 WALL. 655 (622).

them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to the vote; they depend on the outcome of no election."(1)

The Supreme Court of Pakistan held that, "the very conception of a fundamental right is that, being a right guaranteed by the constitution, it cannot be taken away by the law and it is not only technically inartistic but a fraud on the citizen for the makers of a constitution to say that a right is fundamental but that it may be taken away by the law."(2) This view was reaffirmed by Munir,C.J. in a later case(3) when he said that the very essence of a fundamental right is that it is more or less permanent and cannot be changed like the ordinary law.

A right, to be fundamental, must be such as is enforceable by judicial or some other process. Any action taken by the Legislature or the Executive, in violation of

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(1) West Virginia State Board of Education v. Barnette, (1943) 319 U.S.624.

(2) Jibendra Kishore v. The Province of East Pakistan, P.L.D.1957 S.C.9.

(3) The State v. Dosso, P.L.D.1958 S.C.533.

a fundamental right, is void in law and the Courts are bound to make a declaration accordingly and to give suitable relief to the aggrieved party; this duty is the very essence of what is called judicial review of legislation.(1)

The view of Professor A. Gledhill is that a fundamental right is a restriction on sovereignty for the benefit of the individual.(2) Generally the fundamental rights prohibit "the state" (i.e., the central and provincial governments and legislatures and all local and other public authorities) from doing certain things. Most of the rights are limitations on legislative and executive power but the ban on retrospective penal laws and the rights of an arrested person to be informed of the reason for his arrest, to be produced before a magistrate within twenty-four hours and to consult and be defended by a pleader of his choice are also restrictions on judicial power. The ban on compulsory participation by a student in the ceremonies of a religion other than his own, the citizen's right of access to places of public resort, the ban on forced labour and the

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(1) Abul A'la Maudoodi v. Govt. of West Pakistan, P.L.D. 1964 S.C.673.

(2) Changing Law in Developing Countries.(1963) Page 8.

prohibition of untouchability differ from the other rights in that they operate not only against "the state" but also against private individuals and institutions.(1)

There can be no absolute rights and no uncontrolled liberties in the modern state, for the collective interests of society, the peace and security of the state and the maintenance of public order are of vital importance; fundamental rights can have no meaning, if the state is in danger or disorganised, for not only the state but also the liberties of its subjects are endangered. There must be equilibrium between the rights of individual citizens and the collective good of society.(2)

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(1) Pakistan, The Development of its Laws and Constitution, (1967) p. 194.

(2) Nasrullah Khan v. District Magistrate, P.L.D.1965 Lah.642.

Evolution of Fundamental Rights in India

Before independence British India was governed by the Government of India Acts of 1858, 1909, 1919 and 1935, which were framed on the British pattern and did not guarantee fundamental rights. The absence of the fundamental rights was criticised by most educated Indians and demands were made for their incorporation in the proposed constitutional legislation to be passed by the United Kingdom Parliament but this demand was rejected by the British Government, following its own tradition that freedom is best preserved, not by constitutional provisions, but by adherence to the rule of law and the conventions of the constitution. This was not acceptable to Indians, who had long suffered from discrimination, disabilities and oppressive acts of the foreign rulers. To the most progressive minded Indians a declaration of 'Fundamental Rights' was an essential feature of any Indian Constitution. A series of Congress resolutions, adopted between 1917 and 1919, repeated the demand for civil rights and equality of status with Englishmen. Oneof the Resolutions stated that the Parliament should pass a statute guaranteeing the Civil Rights of His Majesty's Indian subjects a free press, free speech etc.'

The demand for these fundamental rights was also made by the Muslim League at its 18th Annual Session held at Delhi in 1926. The Muslim League adopted a resolution, which was proposed by Quaid-E-Azam Mohammad Ali Jinnah. This resolution, apart from demanding the revision of the Government of India Act, 1919, demanded that any scheme for the future constitution of India should secure and guarantee among others, of the following principles:- "Full religious liberty i.e: liberty of belief, worship, observances, propaganda, association and education." In November, 1927, the Governor-General, Lord Irwin, announced the appointment of the Indian Statutory Commission, which was popularly known as the Simon Commission, to review the political situation in India. The commission consisted of seven members, all citizens of the United Kingdom; Indians were deliberately kept out of it. The exclusion of Indians from the commission was felt as an insult to Indians as it denied Indians the right to participate in the determination of the constitution of their own country. The result was that the commission was greeted with black flag demonstrations and cries of 'Simon go back.'

It is important to note that all Indian parties were unanimous in their firm decision to have nothing to do with the Simon Commission. In spite of the hostile reception given to it, the commission did its work thoroughly and its report was published in May, 1930.

The All Party Report

In February 1928, while the Simon Commission was still touring the country, the All Parties Conferance had its first meeting; it appointed a sub-committee, with Motilal Nehru as its Chairman. Its members represented the views of all articulate groups in British India. Its report was known as the Nehru Report. Referring to the resolution of the Madras Congress of May, 1928, on Fundamental Rights, it declared that the first concern of Indians was to secure the Fundamental Rights that had been denied them. It further said that the Fundamental Rights should be guaranteed in a manner which would not permit their withdrawal under any circumstances. Another reason why great importance was attached to a Declaration of Rights is the unfortunate existence of communal differences in the country. Certain

safeguards would be necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. The report concluded with the observation that Indians could not better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the constitution.

The Simon Commission Report (1930)

The Simon Commission rejected the demand with these remarks, "Many of those who came before us have urged that the Indian Constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of the equal rights of all citizens. We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the war. Experience however has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and means to make them effective."

The Indo-Pakistan leaders again raised the question of Fundamental Rights at the Round Table Conferences.

The Round Table Conference.

The report of the Conference of 1932 recorded the following remarks:-

"The Government have not in any way failed to realise and take account of the great importance which has been attached in so many quarters to the idea of making a chapter of Fundamental Rights a feature in the new Indian Constitution, as a solvent of difficulties and a source of confidence, nor do they undervalue the painstaking care, which has been devoted to framing the text of the large number of propositions, which have been suggested and discussed. The practical difficulties which might result from including many, indeed most of them, as conditions which must be complied with as a universal rule by executive or by legislative authority, were fully explained in the course of discussion and there was substantial support for the view that, as the means of securing fair treatment for majority and minorities alike, the course of wisdom will be to rely, in so far as reliance cannot be placed upon mutual goodwill and mutual trust, on the "special responsibilities," with which it was agreed the Governor-General and the Governors are to be endowed in their respective spheres, to protect the

rights of minorities. It may well be, however, that it will be found that some of the propositions discussed could appropriately and usefully find their place in Constitution and His Majesty's Government undertook to examine them most carefully for the purpose."

The demand for Fundamental Rights was again made to the Joint Parliamentary Committee on Indian Constitutional Reform. In its report of the Session 1933-34, after referring to the report of Simon Commission (mentioned before), the committee recommended,

"With these observations we entirely agree and a cynic might indeed find plausible arguments, in history during last ten years of more than one country, for asserting that the most effective method of ensuring the destruction of a fundamental right is to include a declaration of its existence in a constitutional instrument. But there are also strong practical arguments against the proposal, which may be put in the form of a dilemma; for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will impose an embarrassing restriction on the powers of the legislature and create a grave risk that a large number of laws may be declared invalid by the Courts, because inconsistent with one or other of the rights so declared.

An examination of the lists, to which we have referred, shows very clearly indeed that this risk would be far from negligible. There is this further objection, that the States have made it abundantly clear that no declaration of fundamental rights is to apply in State territories; and it would be altogether anomalous, if such a declaration had legal force in part only of the area of the Federation. There are, however, one or two legal principles which might, we think, be appropriately embodied in the Constitution" .... that no British subject, Indian or otherwise, domiciled in India, shall be disabled from holding public office, or from practising any trade, profession or calling, by reason only of his religion, descent, caste, colour or place of birth, and it should be extended as regards the holding of office under the Federal Government, to subjects of Indian States. ..... that some general provision should be inserted in the Constitution Act safeguarding private property against expropriation.

The result of these recommendations was that section 298 and section 299 were embodied in the Government of India Act, 1935, which read as follows:-

298. -1- No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the

Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.

-2- Nothing in this section shall affect the operation of any law which -

(a) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class; or

(b) recognises the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.

-3- Nothing in this section shall be construed as derogating from the special responsibility of the Governor-General or of a Governor for the safeguarding of the legitimate interests of minorities.

299. -1- No person shall be deprived of his property in British India save by authority of law.

-2- Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.

-3- No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

-4- Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.

-5- In this section "land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking.

After independence, both India and Pakistan embodied a long list of Fundamental Rights in their respective Constitutions.

The 1956 Constitution and Fundamental Rights in Pakistan.

On the 14th August, 1947 Pakistan came into existence as a sovereign State. The idea was to provide a homeland for Muslims; a place where, after the British Imperial power had gone, they could freely develop their way of life in an Islamic environment. The first Constituent Assembly was elected and commenced its work with great enthusiasm in Karachi on 10th August, 1947. The Constituent Assembly consisted of forty-four representatives from East Pakistan, twenty-two from Panjab, five from Sind, three from North West Frontier, one each from Baluchistan, Khairpur, Bahawalpur; the Baluchistan and North West Frontier states had one each. This Constituent Assembly was a failure; it had been not elected for this task. It was, in fact, a dismembered part of the All-India Constituent Assembly, elected in 1946, as recommended in the British Cabinet Mission's plan, by members of the existing provincial legislatures. Quaid-E-Azam Mohammad Ali Jinnah was unanimously elected as the first President. On the 12th August, 1947, the Constituent Assembly met under the Presidentship of Quaid-E-Azam and various committees were set up. One of them, to report on Fundamental Rights

and on matters relating to minorities, was presided over by Quaid-E-Azam himself.

The famous Objectives Resolution was passed in March, 1949; this was the first step towards making the constitution. The Objectives Resolution reads as follows:-

In the name of Allah, the Beneficent, the Merciful:

Whereas sovereignty over the entire universe belongs to God Almighty alone and the authority, which He has delegated to the State of Pakistan through its people, for being exercised within the limits prescribed by Him, is a sacred trust :

This Constituent Assembly, representing the people of Pakistan, resolves to frame a Constitution for the sovereign independent State of Pakistan ;

Wherein the State shall exercise its powers and authority through the chosen representatives of the people ;

Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enumerated by Islam, shall be fully observed ;

Wherein the Muslims shall be enabled to order their lives in accord with the teachings and requirements of

Islam, as set out in the Holy Quran and the Sunnah ;

Wherein adequate provision shall be made for the minorities freely to profess and practise their religions and develop their cultures ;

Whereby the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan, shall form a Federation, wherein the units will be autonomous, with such boundaries and limitations on their powers and authority as may be prescribed ;

Wherein shall be guaranteed fundamental rights, including equality of status, of opportunity and before the law, social economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality ;

Wherein adequate provision shall be made to safeguard the legitimate interests of minorities, backward and depressed classes ;

Wherein the independence of the judiciary shall be fully secured ;

Wherein the integrity of territories of the Federation, its independence and all its rights, including its sovereign rights on land, sea and air shall be safeguarded ;

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the world and make their full contribution towards international peace and progress and happiness of humanity.

The Committee on Fundamental Rights presented its interim report to the Constituent Assembly on 28th September 1950. The main recommendations were, that all persons should be entitled to equal protection of the law. No person should be deprived of life or liberty save in accordance with law, nor punished for an act not declared punishable by law when it was done. Habeas corpus should only be suspended in grave emergencies. Apart from reservations for backward classes, there should be no discrimination in appointment to the public services on grounds of religion, race, caste, sex, or place of birth. No person should be deprived of property save in accordance with law, and adequate compensation should be paid for property taken for public purposes, citizens

should enjoy freedom of expression, association, and peaceable assembly, liberty to follow any avocation, to deal with property, to move freely throughout Pakistan, and the right to equal pay for equal work. There should be freedom to practise and propagate religion, but secular activities of religious bodies were to be subject to regulation. No person attending an educational institution should be required to submit to religious instruction other than his own. All communities were to be permitted to establish and maintain educational institutions, to which the state should not deny recognition, if they refused admission to members of other communities. No person should be obliged to pay taxes to maintain any religion other than his own.

The first Constituent Assembly was dissolved on 24th October, 1954 after seven years of intermittent debate, without having made an acceptable constitution. The Constituent Assembly was dissolved by a proclamation of emergency issued by the Governor-General, Ghulam Mohammad, declaring that the constitutional machinery had broken down and that the assembly could no longer function. The dissolution of the assembly was challenged by Maulvi Tamiz-ud-Din Khan, President of the Constituent

Assembly, in the chief Court of Sind. The court held that the dissolution was illegal.(1) The Federal Court on a special Reference by the Governor-General held that the dissolution was legal.(2)

The second Constituent Assembly was soon elected and had its first meeting under the leadership of Chaudhari Mohammad Ali at Murree on 5th of July 1955. The new Constitution Bill was published on 8th January 1956. It was passed on 17th February, after some amendment, not exclusively on matters of detail. The new Constitution came into force on 23rd of March, 1956.

Part II of the 1956 Constitution embodied an elaborate list of Fundamental Rights. Articles 3 to 22 contained fundamental rights, which included the right to equality, prohibition against discrimination, freedom of speech, freedom of assembly and association, freedom to acquire, hold and dispose of property, freedom to Trade and practise a profession, freedom of religious belief and practise. Limitations were imposed on State action and legislation

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(1) Maulvi Tamiz-ud-Din Khan v. Federation of Pakistan, P.L.D.1955 Sind 96.

(2) Special Reference by the Governor-General, P.L.D.1955 F.C.435.

relating to compulsory acquisition, arrest and detention and penal laws with retrospective effect. The High Courts and the Supreme Court were given jurisdiction to issue appropriate writs for the enforcement of any of the rights conferred by Part II. Article 4 provided that laws inconsistent with or in derogation of the fundamental rights should be void to the extent of the inconsistency.

The Constitution came into force in 1956 and remained operative for about two and a half years. What happened during these years, which led to the abrogation of the constitution and to the Military Revolution, was that, after Mr. Liquat Ali Khan's death in 1951, the Ministry changed six times in seven years at the centre. In the Provinces the position was no better. Governors were frequently changed and some of the Governors, with the connivance of the Governor-General or the President, busied themselves in manoeuvring changes to their own advantage. In a country where the changes in Government were so frequent and persons in high position were perpetually engaged in creating and destroying majorities in their own interests, and where members of the Assemblies, tempted by the lure

of office, power, or gain, changed their political affiliations overnight, Government by majority became a farce and led to every kind of evil-corruption, favouritism, nepotism, inefficiency and lack of responsibility. Under pressure, threats and inducement, the services became demoralised and began to flow with the tide; Government became incapable of concieving long range social and economic policies; and measures of public welfare became a secondary consideration. Going to extremes, the situation became menacing to the preservation of social order itself and the ground was prepared for a revolution. In such circumstances, when revolution comes, the person who tries to assume charge of the country, or perish in the attempt, may be a patriot or an adventurer, an army commander or a national hero, the determining factor being the inclination of the army.(1)

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(1) M. Munir, Constitution of The Islamic Republic of Pakistan. Page 50.

The Military Revolution of 1958.

During the night of 7th and 8th October, 1958, a group of generals led by the Commander-in-Chief, General Mohammad Ayub Khan, seized power and induced President Iskander Mirza to issue a proclamation, which abrogated the Constitution, dismissed the Central and Provincial Cabinets, "with immediate effect", dissolved the Central and Provincial legislatures, abolished all political parties throughout the country and imposed Martial Law. General Mohammad Ayub Khan was appointed as Chief Martial Law Administrator.

On 8th October, 1958, General Mohammad Ayub Khan in a broadcast said, "Had he (President Iskander Mirza) not done so, the armed forces would have acted on their own initiative, because there was no other way to save the country from the chaos created by the baseness, chicanery and deceit of the old gang of politicians; his ultimate aim was to restore a type of democracy that Pakistanis could understand and work." By the proclamation of 7th October, 1958 President Iskander Mirza, in fact, handed over the administration of the country to General Ayub Khan. It was evident that he could not enjoy the monopoly of power, while the responsibility for

administration lay with the army. He therefore soon had to resign and on 27th October, 1958, General Mohammad Ayub Khan assumed the office of President as well.

The Laws (Continuation in Force) Order, 1958, issued by the President on 10th October, 1958 was deemed to have come into force with effect from 7th October, 1958. The general effect of the order was the restoration of laws that were in force before the Proclamation, of the jurisdiction of all Courts, including the Supreme Court and High Courts and of other public authorities, and the continuance in office of persons in the service of Pakistan. It provided that, subject to the Martial Law regulations and orders, the Republic was to be governed as nearly as possibly by the Constitution of 1956.

The Constitution of 1962.

The Martial Law regime proved effective and at least it gave stability to the country, which it was lacking. On 17th February, 1960 a Constitution Commission was appointed to examine the circumstances which had led to the abrogation of the constitution of 1956 and to submit constitutional proposals for the future constitution of Pakistan. The Commission issued a questionnaire and the replies that it received attributed to the failure of Parliamentary form of Government the following three causes :-

1) Lack of proper elections and defects in the Constitution,
2) Undue interference by the Head of State with the ministries and political parties, and by the Central Government with the functioning of the Government in the Province,
3) lack of leadership, resulting in lack of well-organised and disciplined parties, the general lack of character in politicians and their undue interference in the administration.

The real cause of the failure was the last; that was the opinion of the Commission. Summing up their opinion in the report they observed,

"We therefore conclude, as we began, with the observation that the real causes of the failure of the Parliamentary form of Government in Pakistan were mainly the lack of leadership, resulting in lack of well organised and disciplined parties, the general lack of character in politicians and their undue interference in the administration."

The Commission (one member who recommended a unitary form of Government dissenting,) recommended the Presidential form of Government as most suitable to the conditions in Pakistan and made a number of other recommendations, which were generally rejected by the Government, but that relating to the Presidential form of Government was accepted.

The Commission considered the question "whether the provisions of the late constitution, which enumerated the Fundamental Rights, should be incorporated in the New Constitution, or the assurance of such rights can safely be left, as in United Kingdom, to the fundamental good sense of the Legislature and the operation of the recognised principles through the wisdom and experience of Courts."

The Commission found that the majority view (98.39 per cent) was in favour of the first alternative. The Commission itself was in favour of this opinion and therefore recommended that Articles 4-22 of the late Constitution be incorporated in the New Constitution.

The Commission, however, recommended that the Frontier Crimes Regulation 1901 and West Pakistan Land Reforms Regulation 1959 (Martial Law Regulation No.64) should be given special protection from avoidance for violation of any constitutional limitation.

After about fourteen months work, which included considering more than 6,000 answers to the questionnaire, the Commission, under the Chairmanship of Mr. Shahab-ud-Din, former Chief Justice of Pakistan, presented its report to the President on 6th May 1961. The President with other members of the Cabinet then studied it and made many changes. Mr. Manzoor Qadir, who was himself Foreign Minister at that time and an eminent lawyer, played an important role in this finalisation of the constitution. The resulting finalized Constitution was signed by the President on 1st March, 1962 and came into effect on the 8th June, 1962.

The Constitution in Part II embodied fifteen principles

as 'Principles of Law-Making', thereby purporting to maintain and guarantee thefundamental rights. Sub-Article 1 provided that "No Law should be repugnant to Islam." Articles 2 -16 embodied equality of citizens, freedom of expression, freedom of association, freedom of movement, the right to acquire property, freedom to follow an avocation, freedom of religion, safeguard in relation to arrest and detention, protection against retrospective punishment, regulation of compulsory acquisition of property, protection against forced labour, public education, access to public places, protection of languages, scripts and cultures, protection against slavery and prohibition of untouchability.

The Principles of Law Making were not made justiciable. Part II dealing with Principles of Law Making and of Policy provided that :-

The Principles set out in this Chapter shall be known as the Principles of Law making and it is the responsibility of each Legislature to ensure that a proposed law is not made by it, if the proposed law disregards, violates or is otherwise not in accordance with those Principles.(1) It further provided that the responsibility of deciding

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(1) Article (5) of the Constitution of 62, prior to First Amendment Act, 1963.

whether a proposed law does or does not disregard or violate, or is or is not otherwise in accordance with, the Principles of Law-making is that of the Legislature concerned, but the National Assembly, a Provincial Assembly, the President or the Governor of a Province, may refer to the Advisory Council of Islamic ideology for advice on any question that arises as to whether a proposed law disregards or violates, or is otherwise not in accordance with, those principles.

The validity of a law shall not be called in question on the ground that the law disregards, violates or is otherwise not in accordance with the Principles of Law-making.(1)

President Ayub Khan tried to justify these constitutional arrangements and said,

"The responsibility for ensuring that no law is made which is contrary to fundamental human rights has been placed upon the law-makers. Principles have been enunciated for the law-makers, which they are under an obligation to observe. The first of these Principles is that no law shall be made that is repugnant to Islam. The second is that all citizens shall be treated alike in all respects. There are fifteen such Principles of

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(1) Article (6) Ibid.

Law-making set out in the Constitution. In case the Central or the Provincial Legislature is in doubt whether a provision in any proposed law is not repugnant to Islam or at variance with any other principle, it has been made possible for it to refer the question for advice to a body set up under the Constitution to be called the "Advisory Council of Islamic Ideology." A position has thus been brought about, under which the functions of the Courts will be to take notice and to rectify breaches of law. Any person, who has not been treated in accordance with law or who is treated otherwise than in accordance with law, will have the right to go to a Court with his grievance, whether it is against a private person, a public servant, an official agency or a department of the Government. No Court however, shall be at liberty to refuse to enforce a law, because it is of the opinion that the law is not in accordance with the Principles of Law-making. The relevant opinion for this purpose is of the law-makers and of nobody else. Fundamental Rights have thus been secured in the Constitution, without the complication of all law never reaching the stage of complete certainty, because they remain perpetually susceptible to challenge in a Court of law. Though it is frequently said this challenge guarantees rights of the citizens, in actual practice it

is usually only a rich litigant who can afford to engage the best available talent to throw out a challenge to a law for getting rid of something that operates to his disadvantage, irrespective of whether it is to the advantage of the community at large or not, and frequently hold up indefinitely the implementation of beneficial schemes. The scheme adopted in the Constitution brings our position on the same lines as the position existing in England. Judiciary will have its own built-in arrangement for maintaining internal discipline."

Nevertheless dissatisfaction was felt and a demand was made to make the Fundamental Rights justiciable. The First National Assembly summoned under the Constitution of 1962, in response to the pressure and strong public opinion, passed the Constitution (First Amendment) Act, 1963 and substituted as Fundamental Rights what has appeared in the guise of "Principles of Law-Making." The Fundamental Rights are at present contained in the Part II of the Constitution. Some of these rights are limited to citizens only, whereas the rest are equally available to citizens and non-citizens. These rights may be reasonably restricted in the interest of security of Pakistan public interest, morality and decency, and regulating of any trade or profession by a licensing system. These rights are that

"No person shall be deprived of life or liberty save in accordance with law." The arrested person has the right to be informed of the grounds of his arrest and to consult and to be defended by the legal practitioner of his own choice and to be produced before a magistrate within twenty-four hours. The protection is also guaranteed against slavery and forced labour, as well as against retrospective punishment. Every citizen has the rights to move freely throughout Pakistan and of peaceful assembly and association.

Citizens are also guaranteed right to follow any lawful avocation and enjoy freedom of expression. Every citizen has a right to profess, practice and propagate any religion and to manage religious institutions. There is safeguard against taxation for purposes of any particular religion and as to educational institutions in respect of religion etc. Subject to any reasonable restrictions imposed by law in the public interest, every citizen has the right to acquire, hold and dispose of property and no person is to be deprived of his property, save in accordance with law and compensation is to be paid where the property is taken for public

purposes. All citizens are equal before law and are entitled to equal protection of law. In respect of access to places of public entertainment or resort, not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex, or place of birth. No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated on grounds of race, religion, caste, sex, residence or place of birth. Any section of citizens, having a distinct language, script or culture, shall have the right to preserve the same. Untouchability is abolished, and its practice in any form is forbidden and shall be declared by law to be an offence.

Abrogation of the Constitution 1962

On March 24, President Mohammad Ayub Khan wrote to General A.M.Yahya that, "It is with profound regret that I have come to the conclusion that all civil administration and constitutional authority in the country has become ineffective. If the situation continues to deteriorate at the present alarming rate, all economic life, indeed, civilised existence will become impossible. I am left with no option but to step aside and leave it to the Defence Forces of Pakistan, which today represent the only effective and legal instrument, to take over full control of the affairs of this country."

On 25th March, 1969, Field Marshal M. Ayub Khan announced his resignation in a special broadcast, stating at the very outset that this was the "last time that I am addressing you as President of Pakistan. It is impossible for me to preside over the destruction of my country." Field Marshal Ayub Khan stepped down as President of Pakistan on March 25, following the complete breakdown of civil administration at the end of his ten years rule. Following his resignation, General Yahya Khan took the powers of the President of Pakistan. In a proclamation issued on March 31, General Yahya Khan said, "Whereas by

his declaration made at 19.15 hours (WPT) on the night of 25th March, 1969, Field Marshal Mohammad Ayub Khan, President of Pakistan, has relinquished his office of President and has handed over all power to me, General Agha Muhammad Yahya Khan, as Chief Martial Law Administrator and Supreme Commander of Armed Forces of Pakistan.

"Now therefore I have, on the same night of 25th March, 1969, forthwith assumed office of the President of the Islamic Republic of Pakistan and have taken upon myself the exercise of the said powers and all other powers enabling me in that behalf."

General Agha Muhammad Yahya Khan, Commander-in-Chief of the Pakistan Army, declared Martial Law throughout Pakistan, following President Ayub Khan's relinquishment of the office of President on March 25th. In a proclamation issued from Rawalpindi, General Yahya Khan, who assumed the powers of the Chief Martial Law Administrator, abrogated the Constitution and dissolved the National and Provincial Assemblies. According to the proclamation, a situation had arisen in the country, in which the civil administration could not effectively function and, in the interest of

national security, it had become necessary to place the country under Martial Law. The proclamation went on to declare that, notwithstanding the abrogation of the Constitution and subject to Regulations or Orders made by the Chief Martial Law Administrator, all courts and tribunal in existence immediately before the abrogation of the Constitution, should continue and exercise all their powers and jurisdiction, which they would have exercised had the Constitution not been abrogated.(1)

On April 4, 1969, General Yahya Khan, President of Pakistan, revived parts of the Constitution of 1962, which had been abrogated only ten days earlier, when Martial Law was imposed in the country. The Provisional Constitutional order provided that notwithstanding the abrogation of the Constitution of the Islamic Republic of Pakistan, brought into force on the 8th day of June 1962 .... by the Proclamation and subject to any Regulation or Order made, from time to time, by the Chief Martial Law Administrator, the State of Pakistan should, except as otherwise provided in the order, be governed as nearly as may be in accordance with the said Constitution. Paragraphs 2,4, 5, 6, 7, 8, 9, 13, 14, 15 and 17 of the Fundamental Rights set out in Chapter 1 of Part II

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(1) Pakistan News, London, April 1, 1969.

of the said Constitution should stand abrogated and all proceedings pending in any court, in so far as they were for the enforcement of those Rights should abate ...[1]

General Yahya Khan promised to relinquish power to a civilian government, which would be allowed to draw up a constitution, as soon as law and order were restored. In a broadcast to the nation on the morning of 26th March 1969, the General said that he would eventually restore power to a civilian government. He emphasized that he had no ambition to prolong period of military rule; his sole aim was to protect life, liberty and property, and to put the administration "back on the rails." "I wish to make it absolutely clear to you," the General said, "that I have no ambition, other than the creation of conditions conducive to the establishment of constitutional government. It is my firm belief that sound, clean and honest administration is a pre-requisite for a sane and constructive life and for the smooth transfer of power to the representatives of the people, elected freely and impartially on the basis of adult franchise." In a hint that he was prepared to fulfil Ayub Khan's promise to restore parliamentary democracy, General Yahya Khan said, "It will be the task of these elected representatives to give the country a workable

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(1) Pakistan News, London, April 15, 1969.

constitution and find a solution to all other political, economic and social problems, agitating the minds of the people." ... (1)

General Yahya Khan announced on November 28, 1969 that general elections for the National Assembly would be held on October 5, 1970, on the basis of a "provisional legal framework" to be evolved by his martial law regime. In a radio address, General Yahya Khan said that the Assembly would be charged with the task of framing a constitution within 120 days of its first sitting. If it failed, it would be dissolved and "the nation will have to go to the polls again." The General also said that the elections would be held on the basis of direct adult franchise and the future form of government would be the parliamentary federal form, as there was complete agreement in the country on these two points ...(2)

We now have to wait and see what sort of Constitution Pakistan is going to have; it is hoped that it will be a copy of 1956 Constitution, with some amendments as to the distribution of powers between the centre and provinces.

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(1) The Times, The Daily Telegraph, London, March 27, 1969.

(2) The Times, (London) November 29, 1969.

CHAPTER II

HISTORY OF PREVENTIVE DETENTION

The Development in India, 1773-1918.

Preventive Detention in the Indian Subcontinent has a long history and is often said to be a legacy of the British Indian Government. The Amending Act of 1781 was passed by the British Parliament to settle various controversies which had arisen between the Governor-General and the Supreme Court, established in Calcutta by the Regulating Act 1773. It provided that the Governor-General and his Council should not be subject to the jurisdiction of the Court for anything done in their public capacity. No person could be held responsible by the court for anything done by him under the written orders of the Council, so that the Court was obliged to refuse habeas corpus to a person held under the warrant of the Council.(1) But in the case of a British subject, the Court retained its jurisdiction.

The Charter Act, 1793 provided as follows :-

"It shall and may be lawful for the Governor-General of Fort William aforesaid for the time being to issue his warrant

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(1) In the matter of Ameer Khan, (1870) 6 Ben.L.R.456

under his hand and seal, directed to such peace officers and other persons as he shall think fit, for securing and detaining in custody any person or persons suspected of carrying on mediately or immediately any illicit correspondence dangerous to the peace or safety of any of the British settlements or possessions in India with any of the Princes, Rajahs or Zemindars or any other person or persons having authority in India, or with the commanders, governors or presidents of any factories established in East Indies by an European power, or any correspondence contrary to the rules and orders of the said Company or of the Governor-General in Council of Fort William aforesaid."

But even as early as this, the detainee was given certain rights. The Charter Act 1793, further provided that,

"If there shall appear reasonable grounds for the charge, the said Governor General shall be and is hereby authorised and empowered to commit such person or persons so suspected or accused to safe custody and shall within a reasonable time, not exceeding five days, cause to be delivered to him or them a copy of the charge or accusation, on which he or they shall have been committed

and that the party or parties accused shall be permitted to deliver in his or their defence in writing, together with a list of such witnesses as he or they shall desire to be examined in support thereof, and that such witnesses and also the witness or witnesses in support of the charge, shall be examined and cross examined on oath, in the presence of the accused party and their deposition and examination taken down in writing and if, notwithstanding such defence, there shall appear to the said Governor-General in Council reasonable grounds for the charge or accusation and for continuing the confinement, the party or parties shall remain in custody, until he or they shall be brought to trial in India or sent to England for that purpose."

This Act deprived the courts of their usual powers and the courts in Bengal were obliged to hold that the command of the Governor-General must prevail over any writ that the court had power to issue.

Then came the Bengal Regulation of 1812, which gave the local Governments power to remove immigrants from foreign countries and in certain cases to detain such persons in safe custody. The other well-known legislation on the subject was Bengal State Prisoners Regulation of 1818,

commonly known as the Bengal Regulation; this was the first piece of important legislation on this subject. It empowered the Government to place persons "under personal restraint otherwise than in pursuance of some judicial proceedings." The preamble of the Act explains why :-

"Whereas reasons of State, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of Native Princes entitled to its protection and the security of the British Dominions from foreign hostility and from internal commotion occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding or when such proceeding may not be adapted to the nature of the case, or may for other reasons be inadvisable or improper and where it is fit that, in every case of the nature herein referred to, the determination to be taken should proceed immediately from the authority of the Governor-General in Council;

and whereas the ends of justice require that, when it may be determined that any person shall be placed under personal restraint, otherwise than in pursuance of some judicial proceedings, the grounds of such determination should from time to time come under revision and the person affected thereby should at all times be allowed freely to bring to the notice of Governor-General in Council all circumstances relating either to the supposed grounds of such determination or to the manner in which it may be executed ;

and whereas the ends of justice also require that due attention be paid to the health of every state prisoner confined under this Regulation and that suitable provision be made for his support according to his mark in life and to his own wants and those of his family ;

and whereas the reasons above declared sometimes render it necessary that the estates and lands of Zamindars, taluqdars and others, situated within the territories dependent on the Presidency of Fort William should be attached and placed under

the temporary management of the Revenue Authorities, without having recourse to any judicial proceeding ;

and whereas it is desirable to make such legal provision as may secure from injury the just rights and interests of individuals, whose estates may be so attached under the direct authority of Government ;

the Vice-President-in-Council has enacted the following rules, which are to take effect throughout the Provinces immediately, subject to the Presidency of Fort William from the date on which they may be promulgated."

The prisoners thereunder had no right of habeas corpus but they were allowed to make representations. The Regulation was applied to the whole of Bengal, which included Bihar and Orissa, the U.P. and the Punjab, with the exception of a few scheduled districts. The Presidencies of Madras and Bombay enacted similar Regulations in 1819 and 1827 respectively.

Thereafter the State Prisoners Act, 1850, was passed to remove the doubts as to whether State Prisoners confined under Regulation 11 of 1818 could be lawfully detained in any

fortress, gaol or other place within the limits of the jurisdiction of any of the Supreme Courts of Judicature, established by Royal Charter. To remove similar doubts about the Madras and Bombay Regulations, the State Prisoners Act, 1858, was enacted.

The Indian Criminal Law Amendment Act, 1908, provided for the more speedy trial of certain offences and for the prohibition of associations, dangerous to the public peace.

There was not much change in the law until the outbreak of the First World War in 1914. Very soon after the commencement of the hostilities, an Ordinance was enacted and later on converted into

> "Defence of India (Criminal Law Amendment) Act 1915, to provide for special measures to secure the public safety and the defence of British India and for the more speedy trial of certain offences."

This enabled the Governor-General-in-Council to make rules for the safety and defence of India and for the arrest of any person who contravened the rules. When arrested, the person was not brought to trial before the ordinary courts but was tried by a special commissioner appointed under the Act.

Every trial under the Act had to be conducted by three

Commissioners. Two had to have at least three years experience as judges in criminal trials in the Session Courts and the third had to have the qualifications required for appointment as a High Court Judge. The Commissioners had to follow, as far as practicable, the procedure of the ordinary Criminal Courts.

Except that the accused was brought to trial more quickly, the accused was given substantially the same sort of trial that he would have obtained in the Criminal Courts. The only departure in substance was that there was no right of appeal. The decision of the Commissioners was final, even when a sentence of death was imposed, and all interference by the Courts in any form whatsoever was excluded.

This Act expired six months after the termination of the war and the right to the writ of habeas corpus in Calcutta, Madras and Bombay and an analogous right contained in Section 491 of Criminal Procedure Code for the rest of India was restored.

The Sedition Report, 1918.

To control the revolutionary movement prevailing at that time, the Rowlatt Committee recommended the enactment of new provisions and laid down the following principles for guidance[1] :-

1) When it is considered necessary in the interest of the community to deprive the individual of liberty, then interference with liberty should not be penal in character and such person should be placed in an asylum of a different kind from that of a jail.

2) It must only be after a fair, impartial and adequate enquiry that an order depriving a person of his liberty should be made.

3) A provincial government intending to invoke the preventive measures in the province must declare, as a condition precedent, that these measures are warranted for reasons of necessity in the interest of public safety.

4) The period during which the preventive measures are intended to remain in force should also be specified and should not exceed one year, subject to renewal by an order reciting that the renewal was necessary in the interest of public safety.

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(1) Sedition Committee Report 1918. P.141.

The report further added that cases requiring preventive measures should be divided into two classes, one being of a mild character merely requiring liberty to be restricted, the other, of a more serious nature, necessitating liberty to be temporarily taken away.

For the milder classes of cases it was recommended that the authority should be empowered

1) to demand security from such persons,
2) to restrict their residence,
3) to require their periodical report to the police, and
4) to require their abstinence from acts like journalism or arranging public meetings.

For the more serious class of cases, the following powers were recommended :

1) arrest,
2) issue a search warrant,
3) confinement in non-penal custody.

But, in all cases it was recommended that the government should, before making a final order, refer the case to an investigating authority, which should be empowered to make an interim order of detention pending the enquiry proceedings. With regard to the formation of, and procedure to be adopted by the investigating authority, it

was suggested that it should proceed in camera, without strict adherence to the rules in the Indian Evidence Act; the person affected should not have the right of appearance before it, either in person or by counsel, but the allegations should be communicated to him without disclosing their source.

The government concerned should be under an obligation to inform the authority of the objectionable activities of such person and should make orders only after hearing the findings of the authority, which should consist of three members, of whom one should be a non-official Indian. A visiting committee to look after the condition of the person so restricted and to report to the government was also suggested.

The recommendations of the Rowlatt Committee were substantially adopted in the Rowlatt Act, of 1919, though this Act became a dead letter.

However, the Rowlatt Committee's report laid down principles from which future legislation on the subject of Preventive detention must be regarded as drawing its inspiration.

The Anarchical & Revolutionary Crimes Act,1919.

(Rowlatt Act.)

This measure was enacted to cope with anarchical and revolutionary crimes, to supplement the ordinary criminal law. Its emergency powers should be exercisable by government for the purpose of dealing with anarchical and revolutionary movements.

The main provisions of the Anarchical and Revolutionary Crimes Act (Rowlatt Act) were divided into three parts. The first consisted of provisions for speedy trial of specified offences, committed with the object of subverting the existing government; the second part contained provision for taking security from persons suspected of such crimes or placing them under surveillance or restricting their movements, and the third part provided for detention of person suspected of being concerned in such crimes.

Preventive Detention, 1919 - 1939.

During the years 1919 - 1939, the following provisions were in force :-

(a) Bengal Emergency Powers Ordinance XI of 1931

(b) United Provinces Emergency Powers Ordinance XII of 1931

(c) North West Frontier Province Emergency Power Ordinance XIIIof 1931.

(d) Emergency Powers Ordinance 11 of 1932.

All four Ordinances were promulgated by the Governor-General of India, in exercise of the powers conferred by section 72 of the Government of India Act 1919. All of them were valid for six months only.

The object of the Bengal Ordinance of 1931 was to suppress the terrorist movement and of the others to deal with situations inimical to public peace.

They empowered the provincial governments to authorize their officers, not below the rank of district Magistrate, sub-divisional Magistrate or deputy Superintendent of Police, to arrest persons, if satisfied that there were reasonable grounds for believing that they had acted, were acting or were about to act in a manner prejudicial to the public safety or peace.

Except in the case of the Frontier Ordinance, preventive detention was not the main object of these ordinances. The power of detention after arrest was limited and ancillary to the purpose of trial before a special court or of externment from, or restriction to a particular area.

Under the United Provinces Ordinance an order to reside in a particular area, or not to enter a particular area, could be made by the Provincial Government and would remain in force for only one month, unless government decided otherwise.

Under the Bengal Ordinance, detention was authorized for 24 hours only and under the Frontier Province Ordinance and the Emergency Powers Ordinance, for a period of not more than fifteen days, the normal maximum period under section 167 of the Code of Criminal Procedure for remand of a person arrested by the police and charged with a cognizable offence, before he is released or sent before a magistrate for inquiry or Trial.

Under the Frontier Province and Emergency Power Ordinances, the period of detention could be extended up to maximum of two months with the approval of the provincial government.

An arrest effected under the provisions of the Frontier Province Ordinance had to be reported forthwith to the provincial government, which may rightly be considered as some safeguards of the detenu's interest. No such report was necessary under the other ordinances.

There was no obligation to communicate the grounds of detention, nor was there any provision for hearing a representation from the detenu.

Detention in World War II.

With the outbreak of the Second World War, in 1939, the Defence of India Act, 1939, was passed to meet the then existing war emergency. It empowered the Central Government to frame rules, inter alia, to provide for :-

"the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India, the prohibition of such person from entering or residing or remaining in a particular area and the compelling of such person to reside and remain in any area or to do or abstain from doing anything."

Defence of India Rule 26, was framed for the detention of such persons as were contemplated by the Act.

In Keshav Talpade v. Emperor,[1] this rule was held by the Federal Court to be invalid on the ground that it went beyond the rule-making power, in as much as the Act authorized the making of a rule for the detention of persons reasonably suspected of certain things, while the rule empowered the government to detain a person, even if it was satisfied that it was necessary to do so with a view to prevent him from acting in a manner prejudicial to any of the matters specified therein; in other words, the rule enabled government to detain a person about whom it need have no suspicions, reasonable or unreasonable, that he had acted, was acting, or was about to act in any prejudicial matter at all, but had only to be satisfied that, with a view to preventing him from acting in a particular way, it was necessary to detain him. While the Act imposed a condition of 'reasonableness', the rule only required the 'satisfaction' of the Government. Thereupon the Governor General promulgated Ordinance No. 14 of 1943, which substituted a new clause for clause (X) of sub-section (2) of section 2 of Defence of India Act 1939, and also declared valid all orders made under Rule 26 of the Defence of India Rule.

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(1) A.I.R. 1943 F.C.I.

The Defence of India Act, 1939, was to remain in force during the continuance of the war and for a period of six months thereafter. Under the Defence of India Act and Rules, both the central and Provincial governments were given the power to arrest and detain any person, if satisfied that it was necessary to do so, in order to prevent him from acting "in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war;" and having been vested with these powers, the central and the state governments were given the right to delegate their authority to "any officer or subordinate." In practice the power was usually delegated to the district magistrate and in some cases to the sub-divisional magistrate, but in theory it could have been delegated even to a police constable.

No reason had to be given for the detention; there was no right to make a representation and no one (except the authorities) knew or could tell where the person was detained. No one could see him and he was not allowed to have legal advice.

These provisions were challenged in the Courts. The validity of the Act and the powers conferred by the Rules

were upheld by the Indian Courts, following the English cases about the emergency laws which were similar to Indian Laws.

In Emperor v. Keshav Gokhale,(1) it was held that it was a condition precedent for a detention order that the authority making the order should apply his mind to the actual need for making the order. Otherwise the order of detention would be invalid for want of 'reasonable and satisfactory grounds.' If there was nothing to show that the authority had decided on a quasi-judicial consideration of the pertinent facts, or had exercised his discretion after a full consideration of the facts, the order would be null and void.

All that the Courts could do, therefore, was to interpret the rules and see whether they had been violated in any particular case. But this raised the fundamental question whether the courts had authority to do so. The only way in which the courts could become seized of this kind of case was by the issue of a writ of Habeas Corpus or its equivalent under section 491 of the Criminal Proceedure Code. Government contended strongly that, although there was no provision in the Act abolishing these powers, that had been done by "necessary implication."

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(1) A.I.R. 1945 Bom. 212

The Nagpur High Court refused to accept this contention in P.K. Tare v. Emperor [1] and observed :-

"Such fundamental rights safeguarded under the constitution with elaborate and anxious care and upheld time and again by the highest tribunals of the realm in language of the utmost vigour cannot be swept away by implication or removed by some sweeping generality."

It held therefore that :-

"the rights conferred by section 491 subsist and will continue to subsist, until either the section is expressly or by necessary and express implication, abrogated or the rights are expressly taken away."

In response to the criticism of the courts, government promulgated an Ordinance in 1944, expressly taking away these rights; but, until that was done, the view of the courts prevailed.

The first question raised was whether the courts could inquire into the "satisfaction of the detaining authority." Here the rule laid in Liversidge's case [2] was followed and it was held that they could not, the satisfaction being subjective.

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(1) I.L.R. 1943 Nag. 154

(2) 1942 A.C.206

But the Nagpur High Court held that, although the courts could not look into the grounds upon which the satisfaction was based, they had the power to determine whether there was satisfaction in fact and also to determine whether the order had been made in good faith. It also held that the satisfaction had to be special to each individual case. Thus, when a general order was made directing the detention of all persons concerned in a particular activity, without having any particular person in mind at the time, the order was passed; the order was struck down as faulty. The other High Courts took the same view and so did the Federal Court in a later case, Emperor v. Sibnath Banerjee.(1)

Ordinance III of 1944, mentioned earlier, provided for preventive detention orders to be passed on substantially the same grounds as Defence rule 26, but specifically provided for delegation by the Central Government and Provincial Government of their powers to subordinate officers. Persons preventively detained under rule 26, as well as persons detained under the Ordinance, were, for the first time, entitled to receive from the detaining authority, in the former case "as soon as may be" after the Ordinance came into force, in the later case "as soon as may be" after the order

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(1) A.I.R. 1943. F.C.75

of detention was passed, the grounds on which the order was made, with such particulars as were sufficient, in the opinion of the authority, to enable them to make representations against the order, but excluding facts which the authority considered it against the public interest to disclose. The authority was obliged to inform the detenu of his right to make a representation and give him the earliest opportunity of making a representation.

An order passed by a subordinate officer had to be submitted forthwith to the government under which the officer was serving, which could confirm or cancel it. An order of detention remained in force for a maximum period of six months, but could be renewed for a further period of six months at a time by the government which passed it, or the government, to which the officer who passed the original order of detention was subordinate, after further consideration of the circumstances.

The Defence of India Act lapsed on 1st October 1946, just after the end of Second World War. After its repeal, various Acts, Ordinances and Orders were passed, empowering detention to ensure the public safety, security, suppression of disturbances and maintenance of public order, both in India and Pakistan.

CHAPTER III

THE NECESSITY FOR PREVENTIVE DETENTION

General Considerations

The Constitutions of Pakistan, following the practice of many modern constitutions, include a list of Fundamental Rights; the idea that 'rights are prior to the State' and that every citizen must enjoy certain inalienable and fundamental rights which even the State authorities cannot or should not encroach upon is not new; it is as old as humanity itself. The concept of Natural Law, that law is the essential foundation for the life of man in society and based on his needs as a reasonable being, has inspired such national documents as Magna Carta of 1215, the Habeas Corpus Act of 1679, the Bill of Rights of 1689, the American Declaration of Independence in 1776, and the French Declarations of the Rights of Man in 1789. It has received international recognition in the declaration of "Human Rights" adopted by the United Nations General Assembly on 10th December 1948.

A Committee to report on the fundamental rights of the citizen and matters relating to minorities was set up

in Pakistan at the inaugural session of the First Constituent Assembly in August 1947 and it's interim report was accepted in 1950, long before the adoption of any other important clauses of the Constitution. The basic idea, in the interim report on Fundamental rights was, to quote the words of Khan Liaquat Ali Khan "to respect the dignity of a man." The fundamental rights adopted by the First Constituent Assembly included the familiar freedoms such as equality of status, equality of opportunity, equality before law; social, economic and political justice, freedom of thought, expression, belief, faith, worship and association. These rights were to be enforceable in the Courts.

The Second Constituent Assembly approved all these rights, liberties and liberal principles. They were incorporated in the Constitution of 1956 and again in Chapter I of the Constitution of 1962. Khan Liaquat Ali Khan said, "it has become fashionable to guarantee certain fundamental rights, but I assure you that it is not our intention to give these rights with one hand and take them away with the other."(1)

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(1) Hon. Mr. Liaquat Ali Khan, Speech on "Objective Resolution" on 7th March 1949.

But the fact remains that the Constitutions of Pakistan of 1956 and 1962, while they guarantee the right to personal liberty, also recognise the State's power of Preventive detention. The provision for preventive detention in a chapter of fundamental rights and liberties may seem anomalous. Such provision for preventive detention is inadmissable in England and the United States of America, except during such an emergency as war. The Constitutions of India and Pakistan, however, include provisions of preventive detention even in time of peace, but subject to prescribed limitations.

The partition of the Sub-continent into Bharat and Pakistan resulted in an influx into both countries, of millions of refugees, dissatisfied and disappointed with their lot. The war in Kashmir, grave scarcity of food in many parts of both countries, the exploitation of these conditions by political and economic opportunists and adventurers, profiteers and foreign agents, created a situation inimical to the political security and economic stability of the country, unprecedented in the annals of any democracy. It was the realization of these difficulties and the determination to deal with them in an effective manner, so that civil liberties could flourish in an

orderly society that compelled the constitution-makers to recognise preventive detention and impose such limitations on it as would not inhibit unduly the enjoyment of the guaranteed fundamental rights.

To meet the threats of serious crises which it was anticipated that Pakistan would have to face, stringent measures against subversive and antisocial actions were deemed necessary; peace and tranquility had not become normal features of life in Pakistan, since its emergence as a sovereign state.

The party in power had to combat uncontrolled opposition, some individuals and political parties recognised no limits to political agitation for the purpose of ventilating grievances, subversive movements and abuse of personal liberties appeared to be likely to endanger the whole fabric of a society, which had only recently secured independence.

The reasons for introducing preventive detention in the Indian Constitution were explained in the Indian Constituent Assembly by Dr. Ambedkar in the following words :-

"It has to be recognised that, in the present circumstances of the country, it may be necessary for the

Executive to detain a person who is tampering either with public order or with the defence services of the country. In such case I do not think that the exigency of the liberty of the individual shall be placed above the interest of the state."(1)

This explanation failed to satisfy a considerable section of the Assembly who criticised the provision in the strong terms. In a remarkable speech Bakshi Tek Chand assailed the provision in the severest terms which included the following question,

"..... if there is any written constitution in the world in which there is provision for detention of person without trial in this manner in normal times?"(2)

Replying to the debate Dr. Ambedkar laid emphasis on the special safeguards embodied in the constitution to protect a person arrested under a preventive detention law. He said, "If all of us follow purely constitutional methods to achieve our objective, I think the situation would have been different and probably the necessity of having preventive detention might not be there at all. But I think in making a law we

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(1) C.A.D. IX 1496

(2) C.A.D. IX 1529

ought to take into consideration the worst and not the best ..... there may be many parties and persons, who may not be patient enough to follow constitutional methods but are impatient in reaching their objective and if for that purpose (they) resort to unconstitutional methods, then there may be a large number of people who may have to be detained by the Executive. In such a situation, would it be possible for the Executive to prepare the cases and do all that is necessary to satisfy the elaborate legal procedure prescribed? Is it practicable?"(1)

The reasons for the necessity of such legislation appear from an examination of the arguments put forward by the Indian Government in the Lok Sabha, when introducing the Preventive Detention Act. Sardar Patel said,

"When law is flouted and offences are committed, ordinarily there is the criminal law which is put into force. But where the very basis of law is sought to be undermined and attempts are made to create a state of affairs in which, to borrow the words of ..... (Moti Lal) 'men would not be men and law would not be law', we feel justified in invoking emergent and extraordinary laws."(2)

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(1) C.A.D. IX 1556

(2) Lok Sabha Debates Feb.25 1950 P.976.

Dr. Katju summarized the necessity for preventive detention in an entirely different way,

"the endeavour here is to preserve freedom, restore freedom, safeguard the security of the country, at a cost of one year's detention."(1)

"We cannot dig a well when the house is on fire."(2) This class of legislation, which is legacy of war days, has been retained on our statute book, as it was felt desirable to combat certain types of situation, with which the country was continually being confronted as a matter of painful necessity. Bracton said that "what is not otherwise lawful necessity makes lawful."

Sir William Scot wrote in his book,

"Necessity creates the law; it supersedes rules; and whatever is reasonable and just in such, is likewise legal."(3)

It is a matter of evil necessity that we have adopted such legislation even in time of peace.

Preventive detention is an administrative necessity and likely to cause less human misery than might result from likely alternative measures to deal with persons who, cannot

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(1) Lok Sabha Debates, August 6, 1952 Col.5713
(2) Mr. G.A. Despande, Ibid. May 30, 1956
(3) Current Legal Problems, 1953, P.218

be successfully prosecuted for their activities, though they are menace to public security and order.(1)

President Nyerere(2), while emphasising the need of preventive detention, said, "While the vast mass of the people give full and active support to their country and its government, a handful of individuals can still put our nation into jeopardy and reduce to ashes the effort of millions."

Judicially speaking the need for preventive detention further arises in the sense that such detention of a person without trial is necessitated by the fact that the evidence in possession of the authority will not be sufficient to make charge or to secure the conviction of a detenu by legal proof,(3) but it may be sufficient to justify the detention for reasons connected with Defence, Foreign affairs, the security of the state, the maintenance of public order or the maintenance of supplies and services essential to community.

To sum up, Preventive detention in case of such an emergency as war is well recognised. But in recent time the necessity of having such legislation in time of peace has been felt necessary to prevent antisocial and subversive elements from imperilling the welfare of States. Pakistan, India, Burma, Ghana, Tanzania, Malaya and other countries have made constitutional and other statutory provisions recognising and regulating it.

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(1) Alan Gledhill. Fundamental Rights in India (1955) P.126

(2) Chief of State, Tanzania, speech inaugurating the University College, Dar-es-Salam. 1964.

(3) Liversidge v. Anderson, 1942. A.C.206 (218).

Preventive Detention in England

In England it has not been easy to reconcile preventive detention with the rule of law. There are no constitutional limitations on the powers of the Parliament and it is only by convention that preventive detention is enacted in time of war. For long the orthodox view of English lawyers was expressed by Dicey as follows :-

"The physical restraint of an individual may be justified only on the ground that he has been accused of some offence and must be brought before the court to stand his trial; and that he has been convicted of some offence and must suffer punishment for it."(1)

It is on this view that the Lords have been asked to intervene in cases of preventive detention in time of war since 1914 but since the decisions in Rex v. Halliday (2) and Liversidge v. Anderson(3) it is settled law now that Parliament may empower the executive to make regulations for the detention without trial of persons whose detention appears to be expedient in the interests of the public safety or the defence of the realm, but this is subject to safeguards against abuse.

During the first world war, the national emergency

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(1) Dicey, Law of the Constitution.
(2) Rex v. Halliday 1917 A.C.260
(3) Liversidge v. Anderson, 1942 A.C.206.

required Parliament to pass The Defence of the Realm Consolidation Act, 1914, under which a number of Regulations were made, including Regulation 14-B, which permitted the Secretary of State to subject any person "to such obligations and restrictions as hereinafter mentioned in view of his hostile origin or associations." Under this Regulation one, Arthur Zadig was interned and he applied to King's Bench for a writ of habeas corpus, which was refused. The matter was ultimately brought before the House of Lords in Rex. v. Halliday.(1) Lord Shaw described the Act as a violent exercise of 'arbitrary power'and that the prisoner had been regulated out of liberty. But the majority of Lords thought the Regulation, made under the Defence of the Realm Consolidation Act, valid and necessary for the public safety in a time of danger. Lord Finlay, L.C. said that the rule that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown, had no relevance in dealing with a measure intended to prevent public danger, when the safety of the State was involved. "One of the most obvious means of taking precautions against dangers such as are enumerated is to

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(1) Rex v. Halliday 1917 A.C.260.

impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy."(1) "Preventive detention is not a punitive but precautionary method. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it."

Lord Atkinson, while dealing with the merits of the case, made the following observations :-

"If the Legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things, for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if intra Vires, do not infringe the Habeas Corpus Acts or take away any right conferred by Magna Carta."(2)

The matter was again considered in Ronnfeldt v. Phillips(3), where under one of the Defence of the Realm Regulations a person was ordered not to reside in a particular locality, since the military authorities suspected him of acting in a manner prejudicial to public safety. Scrutton L.J. observed in his judgment,

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(1) Ibid. Page 269

(2) Ibid. Page 272

(3) Ronnfeldt v. Phillips, 1918 35 T.L.R. (46 - 47).

"The Courts were always anxious to protect the liberty of the subject. They did so both in the interest of the subject himself and in the interest of the State. In time of war, there must be some modification in the interests of the State. It has been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried on according to the principles of Magna Carta."

Thus in almost every case arising out of a Regulation or law made in time of war, the courts have upheld the paramount interests and security of the state. In Rex v. Superintendent of Vine Street Police Station, Ex parte Libman,(1) Bailhache J. observed

"Above the liberty of the subject is the safety of the realm and if the internment of an alien enemy is considered by the executive Government, charged with the protection of the realm, desirable in the interests of the safety of the realm, the action of the Government in so doing is not open to review by the courts of law by Habeas Corpus."

Lord Parker in Re Zamora(2) said,

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(1) Rex v. Supt.of Vine St. Police Station, Ex parte Libman, 1916 K.B. 275

(2) Re Zamora 1916 2 A.C.77 at 107.

"those who are responsible for the national security must be the sole judges of what the national security requires."

The second world war necessitated the passing of the Emergency Powers (Defence) Act of 1939, which gave power to the executive to make regulations for the purposes of public safety, defence of realm, maintenance of public order, the efficient prosecution of the war, the maintenance of supplies and services essential to the life of the community, the apprehension, trial and punishment of persons offending against the Regulations and detention of persons "whose detention appears to the Secretary of State to be expedient in the interest of public safety for the defence of the realm, the taking possession or control of any property or undertaking, the requisitioning of any property other than land, entering and searching any premises.

The Regulation which directly dealt with preventive detention was 18-B, which said,

"If the Secretary of the State has reasonable cause to believe any person to be of hostile origin or association or to have been recently concerned in acts prejudicial fo public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is

necessary to exercise control over him, he may make an order against that person directing that he be detained." This Regulation came up for consideration in Liversidge v. Anderson.(1)

The facts of the case were that in May, 1940, Sir John Anderson, the Home Secretary, made an order for a detention of one, Robert Liversidge. Liversidge applied for particulars of the grounds, which had led the Home Secretary to entertain the belief that he was of hostile associations and for a declaration that his detention was unlawful and false imprisonment. This request was refused by the King's Bench Division and the refusal was sustained by the Court of Appeal.

It was held that, where the Secretary of the State, acting in good faith under Regulation 18-B, makes an order, in which he recites that he has reasonable cause to believe a person to be of hostile association and that by reason thereof it is necessary to exercise control over him and directs that that person be detained, a court of law cannot inquire whether, in fact, the Secretary of State had reasonable grounds for his belief; that the matter is one for the executive discretion of the Secretary of State.

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(1) Liversidge v. Anderson 1942 A.C.206.

Accordingly, in an action by a person detained against the Secretary of State for damages and for false imprisonment it was held that "the court could not compel the defendant to give particulars of the grounds on which he had reasonable cause to believe the plaintiff to be a person of hostile associations or that by reason of such hostile associations it was necessary to exercise control over the plaintiff and that the production by the Secretary of State of an order of detention, made by him and ex facie regular and duly authenticated, constituted a defence to such an action, unless the plaintiff discharged the burden of establishing that the order was invalid.

Lord Macmillan observed,

"In a time of emergency, when the life of the whole nation is at stake, it may well be that a Regulation for the defence of the realm may quite properly have a meaning which, because of it's drastic invasion of the liberty of the subject, the Courts would be slow to attribute to a peace time measure ..... the liberty which we so justly extol is itself the gift of the law and, as Magna Carta recognises, may by the law be forfeited or abridged. At a time when it is undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that

he possesses, for his country's cause, it may well be no matter of surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention. .... It is for the Secretary of State alone to decide, in the forum of his own conscience, whether he has a reasonable cause to believe and he cannot, if he has acted in good faith, be called upon to disclose to anyone the facts and circumstances, which have induced his belief or to satisfy anyone but himself that these facts and circumstances constituted reasonable cause to believe."

Lord Maugham, in his speech in the House of Lords, dealt with the question of construction of the words "if the Secretary of State has reasonable cause to believe" and the question whether the words require that there must be an external fact as to reasonable cause for belief and one therefore capable of being challenged in a court of law, or whether the words in the context in which they are found point simply to the belief of the Secretary of State founded on his view of their being reasonable cause for the belief he entertains. His Lordship observed,

"..... I am not disposed to deny that, in the absence of a context, the prima facie meaning of such a phrase as

"if A.B. has reasonable cause to believe a certain circumstance or thing" should be construed as "if there is in fact reasonable cause for believing that thing and if A.B. believes it." However I am quite unable to take the view that the words can only have that meaning. It seems to me reasonably clear that if the thing to be believed is something which is essentially one within the knowledge of A.B. or one for the exercise of his exclusive discretion, the words may well mean, "if A.B. acting on what he thinks is reasonable cause (and of course acting in good faith) believes the thing in question."(1)

The majority view was that the words "reasonable cause" cannot be construed as imposing an objective condition precedent of facts on which a person detained would be entitled to challenge the grounds of the Secretary of State's honest belief; in short the cause is subjective and not objective.

Lord Atkin however recorded a strong dissenting note and took a different view of the question. He was of the opinion that :-

"Reasonable cause" for an action or a belief is just

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(1) Ibid. . Page 219-220.

as much a positive fact, capable of determination by a third party, as is a broken ankle or a legal right. If its meaning is the subject of dispute as to legal rights, then ordinarily the reasonableness of the cause, and even the existence of any cause, is in our law to be determined by the judge, and not by the tribunal of fact, if the functions of deciding law and facts are divided. Thus, having established, as I hope, that the plain and natural meaning of the words "having reasonable cause" imports the existence of a fact or state of facts and not the mere belief by the person challenged that the fact or state of facts exists, I proceed to show that this meaning of the words has been accepted in innumerable legal decisions for many generations and that "reasonable cause" for a belief, when the subject of legal dispute has always been treated as an objective fact, to be proved by one or other party and to be determined by the appropriate tribunal."

His Lordship went on further to say :-

"No one doubts that the Emergency Powers (Defence) Act, 1939, empowers His Majesty in Council to vest any minister with unlimited power over the person and property of the subject. The only question is whether in this Regulation they have done so." After referring to certain statutes

empowering a police officer to arrest a person if he had reasonable cause to believe that he had committed an offence, he proceeded "... It is said that it could never have been intended to substitute the decision of judges for the decision of the Minister, or, as has been said, to give an appeal from the Minister to the Courts. No one, however, proposes either a substitution or an appeal. A judge's decision is not substituted for the constable's on the question of unlawful arrest, nor does he sit on appeal from the Constable. The judge has to bear in mind that the constable's authority is limited, and that he can arrest only on reasonable suspicion and the judge has the duty to say whether the conditions of exercise of the power are fulfilled. If there are reasonable grounds, the judge has no further duty of deciding whether he would have formed the same belief, any more than, if there is reasonable evidence to go to a jury, the judge is concerned with whether he would have come to the same verdict .... "

"I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive minded than the executive. Their function is to give words their natural meaning, not perhaps, in war time,

leaning towards liberty, but following the dictum of Pollock, C.B. in Bowditch v. Balchin,(1) cited with approval by my noble and learned friend Lord Wright in Barnard v. Gorman.(2) In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the Statute.

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, 'one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case, I have listened to arguments which might have been addressed acceptable to the Court of King's Bench in time of Charles 1."

Lord Macmillan, Lord Wright and Lord Romer agreed with the view of Viscount Maugham and concurred with him

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(1) Bowditch v. Balchin, 1850 5 Ex. 378.

(2) Barnard v. Gorman, 1941 A.C.378, 393.

in dismissing the appeal.

Lord Atkin in an earlier case[1] also observed:-

"In accordance with British jurisprudence, no member of the executive can interfere with the liberty or property of a British subject, except on the condition that he can support the legality of his action before a Court of Justice. And it is the tradition of British Justice that judges should not shrink from deciding such issues in the face of the executive."

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(1) Eshugbayi v. Government of Nigeria, (1931) A.C. 662.

Preventive Detention in the U. S. A.

There is no provision for preventive or emergency detention in the American Constitution during peace time, but it grants power to Congress to declare war. The Supreme Court has declared that the war power of the national Government is "the power to wage war successfully." It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of armed forces from injury and from danger which attend the rise, prosecution and progress of war.(1)

When the executive is given wide power to deal with the abnormal situation in their discretion during the war, they can do what is in the best interest of the country. If any specific act does not expressly give them the power to detain a suspected person or spy of alien ancestry, such power can be presumed to be implied. In Ex parte Endo (2) it was held that, "the Constitution, when it committed to the

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(1) Hirabayashi v. U. S. (1943), 320 U.S. 81

(2) Ex-parte Mitsuye Endo, (1944) 323 U.S. 283.

executive and to Congress the exercise of the war power, necessarily gave them wide scope for the exercise of judgment and discretion, so that war may be waged effectively and successfully. The fact that the Act and the orders (Act of March 21, 1942 and Executive Orders 9066, 9102) are silent on detention does not of course mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purposes of this case that initial detention in Relocation Centres was authorised. But we stress the silence of the legislative history and of the Act on the power to detain to emphasize that any such authority which exists must be implied."

In Korematsu's case[1] the Supreme Court found constitutional sanction for meeting the threats of subversion in time of war by the most stringent measures, including detention without trial, of an entire racial group in certain localities. Mr. Justice Black, delivering the opinion of the Court, said "Citizenship has its responsibilities as well as its privileges and in time of war the burden is always

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(1) Korematsu v. U. S., (1944), 323 U.S.214.

heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when, under conditions of modern warfare, our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger ... Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp, because of racial prejudice. Regardless of the true nature of the Assembly and Relocation Centres, and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies, we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area, because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures; they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from

the West Coast temporarily and finally because Congress, reposing its confidence in this time of war in our military leaders, determined that they should have power to do just this. There was evidence of disloyalty on the part of some; the military authorities considered that the need for action was great and the time was short. We cannot, by availing ourselves of the calm perspective of hindsight, now say that at that time these actions were unjustified."

Mr. Justice Murphy who dissented said, "No adequate reason is given for the failure to treat these Japanese Americans on an individual basis, by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry... It is asserted merely that the loyalties of this group "were unknown and time was of the essence." Yet nearly four months elapsed after Pearl Harbor, before the first exclusion order was issued; nearly eight months went by, until the last order was issued, and the last of these "subversive" persons was not actually removed, until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed."

After the Second World War provision for preventive detention in case of emergency was introduced by the Internal

Security Act, 1950, commonly known as the McCarron Act. Sections 100-111, entitled "Emergency Detention," deal with it. The necessity for such legislation was that during World War II, enemy aliens, thought to be dangerous, were placed in internment camps and all Japanese-American citizens on the West Coast were shut up in War Relocation Centres. Under executive orders, which brought about the Japanese-American evacuation, some two hundred individual citizens were required, on security grounds, to move out of other "defense areas" in which they were living and take up residence elsewhere. These World War II measures were more or less ad hoc and they are not regarded with much pride and satisfaction in America. The Internal Security Act, 1950, therefore seeks to regularize such drastic action by providing in advance for what is called emergency detention. One of the reasons given in the Preamble reads as follows:-

The detention of persons, who there is reasonable ground to believe probably will commit or conspire with others to commit espionage or sabotage is, in a time of internal security emergency, essential to common defence and to safety and security of the territory, the people and the constitution of U. S. A. Under Section 102 of the Act, the President is empowered to proclaim an "internal security emergency" in the

event of any one of the following :-

(1) invasion of the territory of the United States or its possessions,

(11) declaration of war by congress, or

(111) insurrection within the United States in aid of a foreign enemy.

A state of "Internal Security Emergency" so declared shall continue in existence until terminated by proclamation of the President or by the concurrent resolution of Congress."

In such an emergency the President, through the Attorney General, may detain any person "as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in acts of espionage or of sabotage."

Any person detained shall be released from such emergency detention upon :-

(a) the termination of such emergency by proclamation of President or by concurrent resolution of the Congress,

(b) an order of release by the Attorney-General,

(c) a final order of release after hearing by the Board of Detention Review, hereinafter established, or

(d) a final order of release by a United States court, after review of the action of the Board of Detention Review or upon a writ of habeas corpus.

The procedure for detention is that such person (detainee) is to be confined in a place of detention provided by the Attorney-General. Within the forty-eight hours after detention, he must be given a hearing before a preliminary hearing officer, appointed by the President. At this hearing he is to be told the ground of his detention and is to be represented by counsel, if he so desires. The detainee may introduce evidence in his own behalf and may cross-examine the witnesses against him, except that the Attorney General or his representative cannot be required to furnish information, the revelation by which would disclose the identity or evidence of a Government agent or officer, which he believes it would be dangerous to national safety and security to divulge.

Thereafter the detainee may appeal to the Board of Detention Review, consisting of nine members appointed by the President and from there to the Court of Appeals and by Certiorari, to the Supreme Court. Depending on the decision of the Board, the Attorney-General has also right to appeal.

Although there is no direct decision as yet upholding the validity of an order of detention under this Act, the cases discussed before suggest its constitutionality.

CHAPTER IV.

THE NATURE OF AND CONSTITUTIONAL RESTRICTIONS ON PREVENTIVE DETENTION LAWS

Definition of Preventive Detention

Preventive legislation was introduced in Indo-Pakistan sub-continent by the Charter Act, 1793, but no authoritative definition was given to it in the sub-continent. This expression was critically examined by the judges in England, while explaining the nature of detention under the Defence of the Realm Act, 1914, passed on the outbreak of the First World War and the same language was subsequently repeated in connection with the Emergency Regulations made during the Second World War.

The measures are precautionary and not punitive and the detenu is not charged with any crime. In the words of Lord Finlay, "Any preventive measures, even if they involve some restraint or hardship on individual, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to State."(1)
Preventive Detention in these measures was defined as "The

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(1) Rex v. Halliday, 1917 A.C.260.

detention of a person without trial, in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of detenu by legal proof, but may be still sufficient to justify his detention for any reason such as defence, foreign affairs, security of the state, maintenance of public order or of supplies and services essential to the community."(1)

According to Professor A. Gledhill(2), in the Indo-Pakistan sub-continent, the expression"'Preventive Detention' is used to describe detention by order of an authority empowered under a statute on his subjective satisfaction that the person detained is likely to act in a manner prejudicial to one or more of the matters described in the statute, such as national defence or public order. Normally the authority acts on information supplied by police or other public authority without taking any evidence."

The detenu is deprived of his liberty, not because of the commission of an offence, which has to be subsequently proved in criminal proceedings, but on suspicion of the

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(1) Liversidge v. Anderson, 1942 A.C.206 (218).

(2) A. Gledhill, Pakistan, The Development of its Laws and Constitution. 2nd Edition P.198.

executive, in the interest of public security and order; the detenu is deprived of certain rights which are available to a person arrested under the ordinary law. It however does not include the detention of a person, who is awaiting trial on a criminal charge, nor the supplementary or additional term of imprisonment, inflicted after conviction upon a habitual offender. Preventive detention has three special features :-

(i) it is detention and not imprisonment,

(ii) it is detention by the order of the executive, without trial or inquiry by a Court,

(iii) the object is preventive and not punitive, with the aim to prevent a person from attaining an object, prejudicial to the interest of the state.

"As the object is precautionary, the matter has to be left to the discretion of the executive authority, which can only act on suspicion and cannot be expected in every case to have proof of any crime committed which will satisfy a court of law .... the test is subjective, based on the cumulative effect of different activities, perhaps spread over a considerable period."(1)

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(1) Liversidge v. Anderson, 1942 A.C.206 (per Lord Finlay).

The basis of detention said S.M.Iqbal, J.[1] is an apprehension based on his past conduct or some information as to the action which he is likely to take in future and therefore it is not possible to lay down any objective standards to come to this conclusion. To do so may create difficulties in the way of executive authority to maintain law and order. If in each case, they are to look for the evidence to satisfy the judicial standards, it may become difficult for them to take any decision, which otherwise may be necessary to prevent an apprehended action on the part of the person. It may well happen that, before they succeed in collecting the necessary evidence, or they may not succeed at all, the person concerned may succeed in his object.

Preventive detention is an abnormal measure, in that it authorizes the executive to impose restraint upon the liberty of a person, who may not have committed a crime but it is apprehended, is about to commit acts that are prejudicial to public safety and order, defence and security of the state. It has been held that, "Preventive justice consists in

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(1) Maulvi Farid Ahmad v. Govt.of West Pakistan, P.L.D.1965 Lah. 135.

restraining a man from committing a crime, which he may commit but has not yet committed or from doing some act injurious to the members of the community, which he may do but has not yet done; it is common to all systems of jurisprudence. This concept of justice proceeds upon the principle that a person should be restrained from doing some thing, which, if free or unfettered, it is reasonably probable that he would do."(1)

According to Lord Atkinson (2) "The preventive justice proceeds upon the principle that a person should be restrained from doing some thing which, if free and unfettered, it is reasonably probable he would do; it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof." Lord Atkinson also cited with approval the case (3) where May,C.J. has observed that, "Preventive justice consists in restraining those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public that such offence as is

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(1) Maung Hla Gyaw v. The Commissioner of Police and One,1948 B.L.R.764 (766).

(2) Rex v. Halliday, 1917 A.C.260.

(3) Rex v. Justices of Cork, (1882) 15 Cox C.C.78.

apprehended shall not happen by finding pledges or security for keeping the peace for their good behaviour."

As stated before, preventive detention is precautionary. The word "preventive" is used in contradiction to the word "punitive." To quote the words of Lord Finlay,(1) "One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy .... The measure is not punitive, but precautionary." While punitive detention comes after the illegal act is actually committed, preventive detention is imposed because the apprehension of wrong doing. As Mukherjee, J. pointed out :- "A person is punitively detained only after a trial for committing a crime and after his guilt has been established in a competent court of justice. Preventive detention, on the other hand, is not a punitive but precautionary measure. The object is not to punish a man for having done some thing but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated and the justification is suspicion or reasonable probability and not

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(1) Rex v. Halliday 1917 A.C.260 (269).

criminal conviction, which only can be warranted by legal evidence."(1)

In England preventive detention is only a war-time emergency measure and the rule of interpretation, as observed by Halsbury is, "In times of war and in matters relating to war, the Crown enjoys generally a somewhat wider latitude in the exercise of the prerogative than in times of peace, for in such matters more stringent measures than are ordinarily allowed by the common or statute law are frequently rendered necessary for the public safety or for the restoration of peace and good order."(2) Presumptions in favour of the liberty of the subject, which are usually of great effect in interpreting statute in times of peace, become relatively weak in times of war, when the safety of the realm is in danger.

The general rule is that, where an Act of Parliament is capable of more than one construction, the Court should prefer that construction "which is the least likely to imperil the safety of the realm." It is right to interpret emergency legislation to promote rather than to defeat its efficacy for the defence of the realm. If there is a reasonable doubt as

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(1) Gopalan v. State of Madras, A.I.R.1950 S.C.27

(2) Halsbury, Laws of England, Vol.VI. Page 527.

to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the order in council, rather than one which will defeat their intention.(1)

In Pakistan and India preventive detention is authorised not only by war time legislation but is also necessary measures during normal times and, under normal circumstances, such rules would not be applicable wholly. It has been observed in India that,(2) "Far greater latitude is allowed to the executive, and presumptions in favour of the liberty of the subject are weakened but those canons and those rights do not disappear altogether. In my opinion some limit must be placed upon claims to the arbitrary exercise of absolute power in matters connected with the restraint of man's liberty, and unless such powers are unmistakably conferred either expressly or by necessary implication and by 'necessary', I mean when no other construction is reasonably possible, they must be taken, at the very least, to be subject to the right of person detained to come before the court and complain of that detention and demand that he be either dealt with according to law or be set at liberty, and this notwithstanding that the act we are considering is a war time measure."

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(1) Liversidge v. Anderson, 1942 A.C.206

(2) Parbhakar v. Emperor, A.I.R. 1943 Nag.26.

The rule that a penal statute ought to be strictly construed has been to a great extent relaxed in modern times, owing to the predominance of the rule that all statute should be construed fairly, so as to effectuate the intention of the Legislature.(1) There is still a strong desire on the part of the Courts to protect the life and liberty of a citizen by the application of old doctrines, at least in normal times, though in times of emergency, different consideration would prevail. In normal times the Court would still act on the presumption against interference with the liberty of the subject.(2) When a clause or expression in a penal statute is capable of being interpreted either in favour or against the accused, the former interpretation ought to prevail and the benefit of the ambiguity ought to be given to the accused.(3) To quote the words of Lord Porter, "A man should not be put in peril on an ambiguity."(4)

When the legislature has given power to the executive to take any action it thinks fit, but limits the right to take

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(1) Maxwell, Interpretation of Statutes, 9th Ed. pp 267, 289.

(2) Bruce v. Beaumont Trust, (1935) 2 K.B.257.

(3) L. and N.E.Rly v. Berriman, (1946) All.E.R.268 (H.L).

(4) Howell v. Falmouth Boat Construction, (1951) 2 All.E.R. 278 (H.L).

action only for a definite purpose, it will be the duty of the Court to decide whether the power has been exercised for that definite purpose, to construe the restriction on liberty as narrowly as possible and limit it within the words used by the Legislature.(1) This principle has been earlier explained by Lord Shaw,(2). His Lordship observed that "The appellant has been interned without a trial, because he is of hostile origin or associations. Parliament never said in words one of those things. If Parliament had really meant to sanction internment without trial for the cause assigned, it could have said so without the slightest difficulty and not left a point which is so fundamental to be reached by inference."
The various other rules of interpretation laid down by their Lordships when the liberty of the subject is involved are :-

1) any provision of a law encroaching upon the liberty of the subject which seeks to oust the jurisdiction of the court, will be strictly construed. (3),

2) ouster of Jurisdiction of the Court will not be inferred, in the absence of express words of the statute (4),

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(1) Eshugbayi v. Govt. of Nigeria, 1931 A.C.662.

(2) Rex v. Halliday, 1917 A.C.260.

(3) Chester v. Bateson, 1920 1 K.B. 829.

(4) Paul v. Wheat Commrs. 1937 A.C.139.

3) should the statute be equally susceptible of two meanings, one leading to an invasion of the liberty of the subject, and the other not, the latter should be preferred, on the ground of the presumed intention of the legislature not to interfere with it (1),

4) where however the words used by the Legislature are clear and unambiguous, the court has no right to interfere, by reading into the statute what is not there, so long as the powers conferred by the Legislature are used for the purpose for which they were meant (2),

5) a cardinal principle of interpretation of statutes is that, except in matters of pure procedure, a statute will not be regarded as operating retrospectively, unless it is so expressly provided therein or the inference follows by necessary implication or intendment (3),

6) laws cannot be "worded or interpreted" so as to invest executive authorities with power to make what statutory rules they please and to use such freedom to make themselves final judges of their own satisfaction(4).

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(1) Marshall v. Blackpool Corp., 1932 1 K.B.688.

(2) A.G.Canada v. Hallet. 1952 A.C.427

(3) Dilbar Hussain v. Ch.Khurshid Ahmad, P.L.D.1956 Lah.865.

(4) Malik Ghulam Jilani v. The Govt.of West Pakistan, P.L.D.1967 S.C.373

During an emergency like war, however, it is clear that the rule that legislation encroaching upon the liberty of the subject should be construed in favour of the subject, "has no relevance in dealing with an executive measure by way of preventing a public danger, when the safety of the state is involved."(1)

The Supreme Court of Pakistan has laid down the following general principles of construction in the President's Special Reference (2); Munir, C.J. said, "One general rule that emerges, and it is an ancient rule, that, in interpretation of written instruments, whether they are constitutional charters, or ordinary statutes, or other documents, the first object of the Court is to discover the intention of the author and that such intention is to be gathered from the words used in the statute or document.

"The second rule is that the intention of the Legislature in enacting a statute ought to be derived from a consideration of the whole enactment in order to arrive at a consistent plan. It is wrong to start with some a priori idea of that intention and try by construction to wedge it into the words of the statute.

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(1) Liversidge v. Anderson, 1942 A.C.206

(2) President's Special Reference No.1 of 1957, P.L.D.1957 S.C. (Pak) 219.

"The third rule that a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made.

"And the fourth rule is that, whenever there is a particular enactment and a general enactment in the same statute, the latter, taken in its most comprehensive sense, would overrule the former; the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute, to which it may properly apply."

These rules are equally applicable to the interpretation of the Constitution, although, because of their permanence and the need to apply them to the changing conditions of the society for which they were meant, Constitutions are subject, in their interpretation, to certain modifications of these doctrines. The duty imposed upon the judiciary, however, of discovering the intention of the framers of the Constitution and the true meanings of the constitutional instrument is equally imperative, and the fundamental principle of constitutional construction has always been to give effect to the intent of the framers of the organic law and of the people adopting it.

The Central Legislature has power to make Laws under Article 131 of the Constitution for preventive detention for

reasons connected with defence, external affairs or the security of Pakistan, and person subjected to such detention. But there is a constitutional restriction on the power of the members of the National Assembly to introduce a bill on this topic. If the bill or amendment relates to preventive detention, it cannot be introduced or moved in the Assembly without the previous consent of the President.(1)

Under Article 132 of the Constitution, the Provincial Legislature has power to make laws for the Province or any part of the Province, with respect to any matter other than a matter enumerated in the Third Schedule, so a provincial legislature can legislate on the subject of preventive detention for the reasons connected with the preservation of public safety and the maintenance of law and order. As this sort of bill or amendment vitally affects the Executive, who are responsible for maintaining the law and order, there is a constitutional restriction that no bill or amendment of a bill, providing for or relating to preventive detention shall be introduced or moved in the Assembly of a Province without the previous consent of the Governor of the Province.(2)

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(1) Article 26, Constitution of the Islamic Republic of Pakistan, 1962.

(2) Article 76, Constitution of Islamic Republic of Pakistan, 1962.

Security of the Person.

Fundamental Right Number 1 in the Pakistan Constitution of 1962 states :-

"No person shall be deprived of life or liberty save in accordance with Law." This, the most important constitutional right, amounts to the declaration that no person is to take the life or liberty of another person, except under a law authorising him to do so. The person, whose life and liberty is threatened, is therefore entitled to require the person seeking to deprive him of the right to live or move freely, to show the legal authority under which he is purporting to act. No public functionary or private person may injure or confine a person, unless he has a legal warrant to do so.(1)

Similar provisions are embodied in the Constitutions of the democratic countries, some of which are reproduced here.

Indian Constitution

"No person shall be deprived of his life or personal liberty except according to procedure established by law." Article 21.

Irish Constitution

"No citizen shall be deprived of his personal liberty save in accordance with law." Article 4 (4)

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(1) Eshugbayi v. Govt.of Nigeria., 1931 A.C.662.

U. S. Constitution

"No person shall ... be deprived of life, liberty or property, without due process of law." 5th Amendment.

England

In Magna Carta it was enacted that

"No man shall be taken or imprisoned, disseiged or outlawed or exiled or in any way destroyed, save by the lawful judgment of his peers or by the law of the land."

This was reiterated in the Petition of Right 1628 and has become an important element of the Rule of Law in England.

It is an established principle of law that the executive cannot take away the life and liberty of a person on it's own responsibility, unless it has the support of some legal provisions for doing so and is acting within the bounds of law.

Lord Atkin in Eshugbayi v. Govt. of Nigeria (1) observed as follows:-

"In accordance with British jurisprudence, no member of the executive can interfere with the liberty or property of a British subject, except on the condition that he can

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(1) A.I.R. 1931 P.C.248; 1931 A.C.662 P.C.

support the legality of his action before a Court of justice; And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the Executive."

The Pakistan Constitution of 1962, in its enumeration of Fundamental Rights gives first place to the above principle and protects the life and liberty of every person, whether a citizen or an alien.

The word "liberty" has been adopted without any qualification. The Irish and Indian Constitutions use the expression "personal liberty." But by qualifying the word "liberty" with the adjective "personal", the scope of the word "liberty" in Article 21 of the Indian Constitution is narrowed (1), to the meaning given in English Law to the expression "Liberty of the person or personal freedom," i.e. the right not to be punished or imprisoned or coerced, except according to the procedure established by law.

It is to be noted that the American Constitution provides that no person shall be deprived of life and liberty without "due process of law." India borrowed the phraseology from the American made Japanese Constitution (Article 31) and

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(1) Keith, Constitutional Law P.434.

instead of the words "except by due process of law," included in the draft Constitution, the Constituent Assembly substituted the words "except according to procedure established by law."

Pakistan has followed the Irish pattern and used the words "in accordance with Law."

Deprivation means "total loss"(1) of liberty, as contrasted with a mere restriction thereon. The right not only covers the initial deprivation but extends to the continuation of such deprivation. Hence the continuation of deprivation of liberty also must be in accordance with law.(2)

The expression "deprived of life" should not be construed to refer only to the extreme case of death. In Munn v. People of Illinois(3) Justice Field (dissenting) observed :-

"By the term "life" something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which the life is enjoyed. The provision equally prohibits the mutilation

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(1) Blackstone's Commentaries, B.K.I. P.134

(2) In re. Pandurang, A.I.R.1951 Bom.30;
A.I.R.1951 Assam 119.

(3) (1877) 94. U.S.113.

of the body by the amputation of an arm or leg or putting out of an eye or the destruction of any other organ of the body, through which the soul communicates with the outer world. The deprivation not only of life but of whatever God has given to every one with life for its growth and enjoyment is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision." But freedom of the person cannot be extended to include a person's livelihood.(1)

Liberty is defined by the Oxford Dictionary as being "free from control." It is a very comprehensive term and would include, not merely freedom to move about unrestricted but such liberty of conduct, choice and action as the law gives and protects.(2) It has been said to embrace every form and phase of individual right that is not necessarily taken away by some valid law for the common good. The right to liberty includes the right to exist and the right to enjoyment of life while existing; it is invaded, not only by deprivation of life but also by a deprivation of those things which are necessary to the enjoyment of life according

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(1) Sant Ram, in re A.I.R.1960 S.C.932 (935).

(2) Allegeyer v. Louisiana, (1897) 165 U.S.578.

to the nature, temperament and lawful desires of the individual.(1) Liberty is a concept of multiple strands; the word liberty, standing by itself, has been given a very wide meaning by the Supreme Court of United States of America. It includes not only personal freedom from physical restraint but the right to free use of one's own property and to enter into free contractual relations. "Personal liberty" largely consists of the right of locomotion - to go where one pleases.(2) Mr. Justice Peckham in Allegeyer v. Louisiana(3) said:-

"The liberty mentioned in that Amendment means, not only the right of the citizen to be free from the physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood or avocation and for that purpose to enter into all contracts, which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

But liberty is not a right which is uncontrollable or

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(1) American Jurisprudence, Vol.II. P.329.
1st Edition, Edited by George S. Gulick.

(2) Williams v. Fears 179 U.S. 270

(3) Allegeyer v. Louisiana (1897) 165 U.S.578.

which is absolute under all circumstances. It has been said that a society, based on the rule that each one is a law unto himself, would soon be confronted with disorder and anarchy. Liberty implies the absence of arbitrary restraint and not immunity from reasonable regulations and prohibitions imposed in the interest of society.

In India, there was a sharp cleavage of opinion among the judges of the Indian Supreme Court in Gopalan's[1] case, about the meaning of "personal liberty." At least three different meanings of the expression emerge from their respective judgments.

Kania C.J. and Das, J., said:- "Personal liberty" includes not only freedom from bodily restraint but also all rights of the human personality. Fazal Ali, J., said:- "Personal liberty" means freedom of locomotion. Mukherjea, J., said:- "Personal liberty" means liberty of the person or body i.e., freedom from imprisonment and physical coercion.

In Pakistan, the word "liberty" is used simpliciter. In the absence of any qualifying word like "personal," the Indian views have no direct bearing on the point; the expression liberty should be construed in a large and liberal sense.

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(1) A.I.R. 1950 S.C.27

But it is to be noted that some of the attributes of liberty mentioned in the American cases cited above are, in Pakistan, covered by freedom of movement (Fundamental Right No.5), freedom of assembly (Fundamental Right No.6), freedom of association (Fundamental Right No.7), freedom to follow an avocation (Fundamental Right No.8), freedom of speech (Fundamental Right No.9), and freedom to deal with property (Fundamental Right No.13). There is a conflict of opinion on whether freedom to travel abroad comes within the scope of Fundamental Right No.1 or Fundamental Right No.5.(1)

Before proceeding further it is necessary to consider the meaning of the phrase, "Due process of Law," "Procedure established by law" and "in accordance with law," which has been used in American, Indian and Pakistan's Constitutions while enunciating security of person.

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(1) See Abdul A'la Mauduodi v. State Bank P.L.D.1969 Lah.708

Due Process of Law.

One of the most famous definitions of "due process of law" is that of David Webster in his argument in the Dartmouth College Case,(1) in which he declared that by the expression "Due process of law" is meant 'a law which hears before it condemns; which proceeds upon inquiry and renders judgment after trial.'

In Hagar v. Reclamation Dist.(2) the Supreme Court said,

"By 'due process of law' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary modes prescribed by law; it must be adapted to the end to be attained, and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justness of the judgment sought. The clause therefore means that there can be no proceedings against life, liberty or property, which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

"Due process of law" generally implies and includes actor, neus, judex, regular allegations, opportunity to answer and a

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(1) (1819) 4 Wheaton (U.S) 518

(2) (1884) 111 U.S.701

trial according to some settled course of judicial proceedings.(1) It is a limitation upon arbitrary power and a guarantee against arbitrary legislation.(2) The expression "due process of law" has been interpreted by the American Courts in different ways at different times.

Willoughby, summarizing the requirement of due procedure, says :-

1) that he shall have due notice, which may be actual or constructive, of the institution of the proceedings by which his legal rights may be affected.

2) that he shall be given a reasonable opportunity to appear and defend his rights, including the right himself to testify, to produce witnesses, and to introduce relevant documents and other evidence.

3) that the tribunal in or before which his rights are adjudicated is so constituted as to give reasonable assurance of it's honesty and impartiality, and lastly

4) that it is a court of competent jurisdiction.(3)

The debates in and reports of the Drafting Committee of the Indian Constituent Assembly show that it was aware of the

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(1) King v. Penther L Comber Co., 171 U.S.437.

(2) Nebbia v. New York, 291 U.S.502.

(3) Constitution of the United States, 2nd Edition, Vol.III P.1769

expression, "due process of law," as it was known to exist in the American Constitution but, after a prolonged discussion, it decided not to adopt that phrase and the words "procedure established by law" were borrowed from the Japanese Constitution. Sastri, J., in Gopalan's case[1] observed:-

"'Procedure established by law' must be taken to refer to a procedure which has a statutory origin, for no procedure is known or can be said to have been established by such vague and uncertain concepts as 'the immutable and universal principles of natural justice.' The word 'established' is significant and is not simply used as synonymous with 'prescribed.' It implies some degree of firmness, permanence and general acceptance, while it does not exclude origination, by statute."

By the use of these words, the Indian Constitution accepted the English principle of supremacy of law in preference to the American principle of judicial review. "Liberty" according to this view is "Liberty confined and controlled by law." "Law" in this expression means state made or enacted law and not the general principle of natural justice. "Procedure established by law" thus means procedure prescribed by the legislature.

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(1) A.I.R. 1950 S.C.27.

In accordance with law.

In Pakistan this phrase was adopted without much discussion. The courts power under this paragraph will include the following :-

(a) to see if the deprivation of life or liberty of a person is done under any law and

(b) to see whether the law is valid;

The "law" contemplated by the Article must be one, which has been passed by a competent Legislature and must not be repugnant to any Fundamental Right, or other provision of constitution. It therefore follows that whoever is called upon to deprive another person of his liberty, in the discharge of what he conceives to be his duty, must strictly and scrupulously observe the form and rules of the law.(1)

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(1) For cases see under Article 2.

Safeguards as to Arrest and Detention

Right No.2 in the Constitution of Pakistan, 1962 is stated as follows :-

1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

3) Nothing in sub-paragraph 1) and 2) shall apply to any person -

(a) who for the time being is an enemy alien or

(b) who is arrested or detained under any law providing for preventive detention.

4) No law providing for preventive detention shall authorize the detention of a person for a period exceeding three

months, unless the appropriate Advisory Board has reported before the expiration of thesaid period of three months that there is, in its opinion, sufficient cause for such detention.

Explanation :-

In this sub-paragraph "the appropriate Advisory Board" means :-

(i) In case of a person detained under a Central Law, a Board consisting of a judge of the Supreme Court, who shall be nominated by the Chief Justice of that Court, and a senior officer in the service of Pakistan, who shall be nominated by the President; and

(ii) in the case of a person detained under a Provincial Law, a Board consisting of a judge of the High Court of the Province concerned, who shall be nominated by the Chief Justice of that Court, and a senior officer in the service of Pakistan, who shall be nominated by the Governor of that Province.

5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order:

Provided that authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose.

The Sixth Amendment to the Constitution of the U.S.A. is :-

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process of obtaining witnesses in his favour, and to have the assistance of Counsel for his defence.

In the Indian Constitution, the corresponding right is :-

Article 22 -

1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to and to be defended by a legal practitioner of his choice.

2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

3) Nothing in clauses 1) and 2) shall apply -

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless -

(a) an Advisory Board consisting of persons who are, or have been or are qualified to be appointed as, judge of a High Court, has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention.

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be,

communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

7) Parliament may by law prescribe -

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause 4).

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of Clause 4).

There is not much difference between the provisions of Right No.2 of Constitution of Pakistan and Article 22 of the Indian Constitution. Whereas India requires the board to be composed entirely of persons qualified for appointment as

judges of a High Court, the Pakistan Constitution of 1956 required the board to be nominated, in case of detention under a Central statute, by the Chief Justice of Pakistan; in a case of detention under a Provincial statute, by the Chief Justice of the Provincial High Court. The Constitution of 1962 requires the President or the Governor to nominate, in addition a senior member of the Civil Service. The provisions of the Indian Constitution, which empowers Parliament to prescribe classes of cases which need not be referred to an Advisory Board, to set maximum period of detention for different classes of detenus and to lay down the procedure to be followed by an Advisory Board are not in the Pakistan Constitution.

Pakistan's Right Number 2 and India's Article 21 deal with two separate matters

(i) persons arrested under the ordinary law of crimes, and

(ii) persons detained under the law of preventive detention.

Sub-paragraphs (1) and (2) provide safeguards in respect of arrest and detention and ensure four things -

1) the right to be informed, as soon as may be, of the grounds of arrest,

2) the right to consult and to be defended by a legal practitioner of his choice,

3) the right to be produced before the nearest magistrate within twenty-four hours of arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate, and

4) the right not to be detained in custody beyond the period of twenty-four hours without the authority of the Magistrate.

But these safeguards do not apply to

(i) an alien enemy, and

(ii) a person arrested or detained under any law providing for preventive detention.

The ordinary law relating to arrest should therefore, provide these four constitutional safeguards, but even if it does not, the requirements, being part of the Constitution, will in Pakistan be read as part of the law and the person aggrieved may seek redress, if they are disregarded.(1)

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(1) Abdul Aziz v. The Province of West Pakistan, P.L.D.1958 S.C.499.

Sub-paragraphs (4) and (5) lay down certain fundamental principles relating to preventive detention, which is designed to prevent abuse of freedom by anti-social and subversive elements, which might imperil the national welfare of the Republic.(1) The major difference between the status of persons punitively and preventively detained is that, in the former case, the individual must be produced before a Magistrate within twenty-four hours, while in the case of the detenu, he can only claim the right to grounds and the right of making representation against the order.

Sub-paragraphs (4) and (5) do not provide for Preventive detention; they only require certain safeguards to be incorporated and read into any law that provides for preventive detention.

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(1) Gopalan v. State of Madras, A.I.R. 1950 S.C.27.

According to the Pakistan Citizenship Act, 1951, "Alien" means a person who is not a citizen of Pakistan or the Commonwealth. Broadly speaking, a person is an alien in a State of which he is not a citizen. But the question whether a person is an alien or not with respect to a State is to be determined by the law of that State.(1) In England, at Common Law, an alien was a subject of a foreign State, who was not born within the allegiance of the Crown. But now an alien may become a British subject by naturalisation, and a British subject may become an alien by renunciation of British citizenship. Aliens are either friends or enemy.
An alien enemy is defined in Halsbury's Laws of England(2) as under,

"An alien enemy is one whose Sovereign or State is at war with the Sovereign of England or one who is voluntarily resident or who carries on business in an enemy's country, even though a natural born British subject or a naturalised British subject." To prove that a person is an alien enemy at a certain given time, it is, however, not enough to show that he was sometime previously domiciled in territory which has become hostile.(3)

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(1) Halsbury, Laws of England, 3rd Ed. Vol.1 Para 964
(2) Ibid ..... Para 994
(3) Ibid ..... Para 995

Aliens, other than 'alien enemies' are alien friends. By statute law, alien friends in England have been given full civil rights, as opposed to civic or political rights. Thus, an alien friend can -

(a) bring and defend actions and prosecutions like a British subject, including actions against the Crown and its officers,(1)

(b) acquire property,

(c) enjoy full personal liberty,

(d) enter into contracts, trade or commerce,

(e) have the benefits of the English law relating to patents, designs and copyright, bankruptcy, wills and descent, subject to certain conditions.(2)

The words "alien enemy" in the sub-clause carry the same meaning as mentioned.

The above mentioned two categories of persons are therefore not

1) given the right to consult nor to be defended by a legal practitioner,

2) entitled to be supplied with the grounds for their arrest "as soon as may be" in the same sense as under clause (1) of Right Number 2,

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(1) Johnstone v. Pedlar 1921, A.C.262.

(2) Halsbury, Laws of England, 3rd Ed. Vol.1 PP 504-506.

3) able to claim that they be taken before the nearest Magistrate within twenty-four hours of their arrest.

While the detenu or alien have no right to consult or engage a lawyer on their behalf, in case of detenu at any rate, by virtue of Right 2 clause (5), he has a right of representation to the Advisory Board but this again does not entitle him to cross examine the witnesses.(1)

But sub-paragraphs (4) and (5) embody certain special constitutional safeguards regarding persons detained under the law relating to preventive detention.

The main provisions are :-

(i) if the period of detention exceeds three months, his case must be referred to Advisory Board, to report on the sufficiency of the cause of detention beyond three months,

(ii) the detenu must be informed, "as soon as may be," of the grounds on which the order of detention has been made,

(iii) he must be given the earliest opportunity of making a representation against the order of detention.

These are the only safeguards available to the detenu and it is the duty of the courts to see that these

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(1) Gopalan A.K. v. State of Madras, A.I.R. 1950 S.C.27

constitutional requirements are fulfilled, before a person can be deprived of his liberty. Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the court .....(1) The provision of a Statute, which imposes restrictions on the personal liberty of a subject, must be strictly complied with before an order of detention, without trial in a regular court of law, can be upheld by the courts. The liberty of the subject is too precious an asset to be interfered with, unless an order of detention is passed in strict conformity with the provisions of the detention law, however formal in character they may appear to be, and all the statutory obligations enjoined on the detaining authority are carried out to the letter.(2)

The detention will be held illegal, if the provisions of the law providing for preventive detention are not complied with.

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(1) Dr. Ram Krishan v. The State of Delhi, A.I.R.1953 S.C.318

(2) Siraj-ud-Din v. The State, P.L.D.1957 Lah.962.

The Advisory Board

Right Number 2 Clause (4) says :-

"No law providing for preventive detention shall authorize the detention of a person for a period exceeding three months, unless the appropriate Advisory Board has reported, before the expiration of the said period of three months, that there is, in its opinion, sufficient cause for such detention."

Advisory bodies are provided for in most preventive detention laws in the Sub-continent and are a check on executive action in detaining persons without trial. The proceedings of the board are confidential. But men of reputed impartiality, with judicial and executive training, examine the one-sided material placed before them, hear the detenu, only if he so desires. It is a sort of a procedural safeguard against arbitrary encroachment on personal liberty by the Government. Government is bound to accept the opinion that there are not sufficient grounds for detention beyond three months.

In view of the fact that preventive detention is a normal feature of our Constitution, the legislatures are empowered to legislate on the aforesaid subject, even in time of peace, not only in times of emergency, for reasons concerned with

public safety, public interest and maintenance of public order, defence, external affairs or the Security of Pakistan. Since independence neither Pakistan nor India has been without such legislation for a single day. It is interesting to note that the Bahawalpur State Public Security Act, 1944 and The Sind State Prisoners Regulations of 1827 (Sind Reg. xxv of 1827), which were legacies of British rule, have recently been repealed by The West Pakistan Maintenance of Public Order Ordinance (XXXI of 1960). The recurring need for a Board in the public interest was evident, in view of the existence of statutes providing for detention in regular operation.(1)

Under the 1956 Constitution of Pakistan, the Board was to consist, in case of a person detained under a Central Act or an Act of Parliament, of persons appointed by the Chief Justice of Pakistan, or, in the case of a person detained under a Provincial Act or an Act of a Provincial Legislature, a Board consisting of persons appointed by the Chief Justice of the High Court of Province.(2) Under the 1962 Constitution, the Advisory Board, in case of a person detained under Central

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(1) Abdul Aziz v. The Province of West Pakistan P.L.D.1958 S.C.499.

(2) Article 7 (4) Constitution of Pakistan 1956.

law is to consist of two persons, one a Judge of the Supreme Court, nominated by the Chief Justice of that court and a senior officer in service of Pakistan, nominated by the President; In case of a person detained under a Provincial Law, the Board consists of a Judge of the High Court of the Province concerned, nominated by the Chief Justice of that court and a senior officer in the services of Pakistan, nominated by the Governor of that Province.(1) Even though clause (4) of Article 7 of the 1956 Constitution of Pakistan did not contain words directly obliging the Chief Justice to appoint the Board in question, yet by inescapable implication, the duty of appointing such a Board was clearly imposed upon the Chief Justice.(2)

It follows that, at present, the President, the Governors, the Chief Justice of Supreme Court of Pakistan, and Chief Justices of the High Court are under a constitutional obligation to constitute Advisory Board for a person detained.

The constitution of the Board will be improper(3) if an officer, who was concerned in the making of the order of

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(1) Right No.2 (4) Explanation. Constitution of Pakistan 1962

(2) Abdul Aziz v. The Province of West Pakistan, P.L.D.1958 S.C. 499

(3) Rehmat Elahi v. Govt. of West Pakistan P.L.D.1965 Lah.112.

detention on behalf of Government, is nominated as a member of the Board by the Government, Nemo debet esse judex in propria causa (no one can be judge of his own cause). His participation in the proceedings of the Board is a violation of natural justice.

The Constitution of Pakistan has taken a progressive step in making provision for nomination to the Board of an executive official from the services of Pakistan. The justification of this is that certain cases under review demand technical knowledge in fields with which the judicial mind is unfamiliar. For example, when a person is detained under the Defence rules, the executive member will be in a position to understand the considerations on which the Government made its decision and explain them to the judge, so as to enable him to form a fair and just view of the case of detenu and decide whether the grounds come within those specified in the relevant preventive statute. In the U.S.A., even during an emergency[1] a Board of Review consists of nine members; it would be better to have at least three members on the Board, two judges and one member of the Civil Service of Pakistan. This would provide a greater safeguard against arbitrary detention by the executive and the liberty of the subject would be better protected.

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(1) Internal Security Act 1950.

The Constitution of India prescribes the qualifications of the members, but does not lay down the number of members necessary to constitute an Advisory Board. Under section 8 of the Preventive Detention Act, 1950 as amended by subsequent Acts up to Act 51 of 1963, the Board is to consist of three members qualified to be appointed as Judges of a High Court.

The function of the Advisory Board is to consider the materials put before it and to report its opinion to government as to whether there is sufficient cause for the detention of detenu. Neither the Constitution nor any statute makes the Advisory Board a court of law or imposes on it the duty of determining whether a person's detention is legal. Under Right Number 2 clause (4) of the Constitution, "No law providing for preventive detention shall authorize the detention of a person for a period exceeding three months, unless the appropriate Advisory Board has reported, before the expiration of the said period of three months, that there is, in its opinion, sufficient cause for such detention."

While delivering judgment in one case(1) Kayani C.J., said, "If the preventive detention is to exceed three months,

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(1) Ghulam Muhammad Khan v. The State, P.L.D.1957 Lah.497.

it must have the approval of an Advisory Board, constituted by the Chief Justice and you could safely swear on the Constitution that the Chief Justice will keep only judicial officer on the Board. The present Provincial Board, it may be pointed out, consist of two judges of High Court. This reduces the "satisfaction" of the Government to a period of three months and it is pertinent to remark that the halo of subjectiveness and immunity from judicial scrutiny with which judicial authority has surrounded it since the last great war, both here and in England, has suffered perceptibly in visual charm by reason of these constitutional safeguards."
Dealing with detention for more than three months, Justice Kayani said, "I appreciate occasional urgency of situation when you may be called upon to take away the liberty of a citizen on your own responsibility for law and order, but my experience in police reports and what with your doubtful morals in the political field, constrains me to rely on your discretion for no more than three months." This view of detention beyond the initial period of three months was affirmed by the Supreme Court where it was held[1] that the satisfaction of the detaining authority, regarding the need for detaining a particular person is not by itself sufficient

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(1) Abdul Aziz v. The Province of West Pakistan, P.L.D.1958 S.C. 499

for continuing that detention beyond an initial period of three months, unless an Advisory Board, as prescribed, has concurred in the opinion held by the detaining authority in that respect. The provisions of Right Number 2 clause (4) were again subject of judicial interpretation in the more recent case of Rehmat Elahi v. Govt. of West Pakistan[1]. A full bench of the West Pakistan High Court explained the provisions of this paragraph. It was held that, "Sub-clause(3) of Fundamental Right Number 2 excepts preventive detention from the safeguard provided in clauses (1) and (2) but, to mitigate the hardship which may befall persons arrested and detained in preventive custody, an embargo is placed, that such a law shall not authorise detention of a person for a period exceeding three months, without the concurrence of the appropriate Advisory Board. What is being said in the clause is therefore, about the attributes of the law providing for preventive detention of 'a person' and not about the person who may fall within its mischief. This enunciation will become clear, if we have before us a law providing for preventive detention for a maximum period of three months. Undoubtedly, such a law will be excluded from

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(1) P.L.D. 1965 Lah. 112

the embargo contained in clause (4) of Fundamental Right Number 2, and the opinion of the Advisory Board is not required, as to the sufficiency of the cause for detaining a person in preventive custody. It is only in cases where the period of detention exceeds three months or more, a serious inroad on the liberty of a person, that the opinion of the Government is made subject to a quasi-judicial review by an Advisory Board, consisting of a Judge of the High Court and senior officer in the service of Pakistan. The sine qua non for the attraction of clause (4) of Fundamental Right Number 2, is, thus, detention for a period beyond three months and not the period set out in the initial order of the detaining authority. Although we are not concerned with the policy of law, it is not difficult to visualise circumstances, which render it impossible for a detaining authority to fix in advance the period for which a person may be detained in preventive custody. For example, if an enemy alien is taken into custody during a war, no one would be able to predict as to when the war will end and, till that event happens, it will be endangering the security of Pakistan to release him from custody."

What worried Mr. Brohi was that, on this interpretation, once the Advisory Board has given carte blanche, the

executive authorities will be able to misuse the provisions of preventive detention laws by detaining, for an indefinite period, political adversaries of the party in power. That such a possibility exists cannot be denied, but the remedy against it lies with the Legislative and not the Courts. In substance, no person can be detained in preventive custody for a period exceeding three months, without the concurrence of the Advisory Board, not only at the initial stage, but whenever it is intended to extend the period of detention beyond the total period of three months.

The grounds of the decision being that, to justify further detention the Board must report, not only that there were sufficient reasons for the initial detention but also that the reasons justified detention for a period exceeding three months. In so holding, the Court differed from the view taken by the Supreme Court of India in Puranlal Lakhanpal's case [1], where it was held that, what the Board is concerned with is whether the grounds for detention were sufficient and, that on that finding it is for the Government to determine the period of detention. The Indian view is founded on the principle that, of the period for which a

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(1) Puranlal Lakhanpal v. The Union of India, A.I.R.1958 S.C.163.

person should be detained, the Government is the judge and not the board, as that body, at the stage at which it functions, does not have sufficient material to enable it to perform what is essentially an executive function. If the Board reports that there is, in its opinion, no sufficient cause for the detention of the person, whose case has been referred to it, for a period exceeding three months, Government must rescind the detention order and direct such person to be released on the expiry of the said period of three months.(1)

Under Clause (4)a of Article 22 of the Indian Constitution, "No law providing for preventive detention shall authorise the detention of a person for a longer period than three months, unless an Advisory Board has reported before the expiration of the period of three months, that there is in it's opinion sufficient cause for such detention."

The question of the proper function of the Advisory Board was considered in Gopalan's case(2). Sastri, J., held that the words "such detention" in the said clause refer back to "preventive detention" mentioned in the first part of clause (4)

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(1) Sub-section 5-f of West Pakistan Maintenance of Public Order Ordinance 1960.

(2) Gopalan v. State, A.I.R. 1950 S.C.27 Para 24.

and not to "detention for a longer period than three months." According to his Lordship, the function of the Advisory Board under Clause (4) is to consider whether there is sufficient cause for detention at all. Kania, C.J. and Fazal Ali, J., took a contrary view, holding that the function of the Board is to consider whether there is sufficient cause for detention for a longer period than three months. But the Advisory Board has no power to express any opinion as to how much longer than three months, if at all, the detenu should be kept in custody.(1) In the very nature of things, the decision as to period of detention must be of the detaining authority. The reference to the Advisory Board is only a safeguard against Executive vagaries and high-handed action.. It is necessary not only that the report of the Advisory Board should be received within the three months but also that the order for the continuation of the detention beyond three months must be passed within the period of three months. (2)

There is no procedure prescribed either in the Constitution of Pakistan or India as to how the enquiry is to be conducted by the Board, but Article 22 (7) of Indian

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(1) Sham Rao v. District Magistrate, Thana. A.I.R.1952 S.C.324.

(2) Gohel Umed Singh v. State, A.I.R.1953 Sau.51.

Constitution states that Parliament may by law prescribe the procedure to be followed by an Advisory Board. Under the West Pakistan Maintenance of Public Order Ordinance (XXXI of 1960) the prescribed procedure is :-

The Board shall, after considering the material placed before it, and the representation, if any, made by the person, whose case has been referred to it, hearing such person, if he so desires, and calling for such further information as it may require from Government or may be placed before it by the person detained, submit its report, before the expiration of the period of three months specified in sub-section (5-b), to Government whether in its opinion there is sufficient cause for the detention of such person.(1)

The proceedings and the report of the Board, excepting that part of the report in which the opinion of the Board is specified, shall be confidential.(2)

The right of representation given to the detenu does not entitle him to appear by any legal practitioner in any matter connected with the reference to the Advisory Board.

The same procedure is prescribed by the Preventive Detention Act, 1950, as amended, of India.

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(1) Sub-Section 5-d

(2) Sub-Section 5-e

If, in any case, the Board reports that there is, in its opinion, no sufficient cause for the detention of the person, whose case has been referred to it, for a period exceeding three months, Government shall rescind the detention order and direct such person to be released on the expiry of the said period of three months. In case the Board reports that there is, in its opinion, sufficient cause for the detention of such person, Government may, subject to the provision of sub-section (1), continue to detain him for such period as it may deem fit.[1] Similar provisions are in section 11 of Preventive Detention Act 1950, of India.

It is not necessary that every law providing for preventive detention should invariably provide for an Advisory Board. If the period of detention provided in the Act is less than three months, a provision for the constitution of an Advisory Board would not be necessary. It has been held [2] that clause (5) of Article 7..[3] clearly guarantees certain rights to the detenu but does

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(1) Sub-Section (5-f)

(2) Abdul Aziz v. The Province of West Pakistan, P.L.D.1958 S.C.499.

(3) Constitution of Pakistan, 1956.

not prescribe that the detention law must necessarily contain any corresponding provision. Therefore a provision in the relevant statute regarding the constitution of the required Board is not necessary. In a case (1) under the Sind State Prisoners Regulation (XXV of 1827), which did not embody the provisions relating to Advisory Board and communication of the grounds of detention, as required under Article 7, clause (4) and (5), Constitution of Pakistan 1956, it was held that the Regulation does not become void, because of the apparent inconsistency with clause (4) and clause (5) of Article 7 (relating to provision for an Advisory Board and communication of the grounds of detention). Thus the failure to provide for the establishment of an Advisory Board will not necessarily amount to an infringement of a fundamental right under the Constitution in every case..(2)

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(1) Sobho Tanwarmal v. The State, P.L.D. 1959 Lah.435

(2) Gopalan v. State, A.I.R.1950 S.C.27.

CHAPTER V

JUDICIAL REVIEW

The Jurisdiction of the High Courts

The opinion of the Advisory Board does not make the detention valid, if it is ultra vires the Constitution or contrary to the statute, or mala fide. The function of the Advisory Board and the Court are quite distinct and do not overlap each other ..[1] As mentioned before, the Advisory Board is a purely advisory body, whose function is to advise the Government whether in its opinion there is sufficient cause for the detention of a particular person. Its opinion cannot oust the jurisdiction of the High Court to determine whether the grounds upon which the petitioner was detained satisfy the requirements of the law. The High Court has no concern with the proceedings of the Advisory Board. The fact that the Constitution has provided an Advisory Board for advising on cases of Preventive Detention does not mean that the right of the High Court to grant a writ of "Habeas Corpus" has been taken away ... [2]

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(1) Raman Lal v. Commr. of Police, A.I.R. 1952 Cal.26.

(2) Prem Dutta v. Supdt. Central Prison, A.I.R.1954 All.315.

The right of a person to a writ of Habeas Corpus is a high prerogative right and is a constitutional remedy in all cases of illegal confinement; it is one of the most fundamental rights in the Constitution. There being no limitation placed on the exercise of this right, it cannot be excluded by any actual or assumed restriction, which may be imposed by any sub-constitutional legislation. Article 2 of the Constitution of Pakistan 1962, says that it is an inalienable right of every citizen to enjoy the protection of law and, in particular, no action detrimental to life or liberty can be taken except in accordance with law. If the arrest of a person cannot be justified in law, there is no reason why that person should not be able to invoke the jurisdiction of the High Court immediately for the restoration of his liberty. In all cases where a person is detained, and he alleges that his detention is in violation of the safeguards provided in the Constitution or that it does not fall within the statutory requirements of the law under which the detention is ordered, he can invoke the jurisdiction of High Court under Article 98 of the Constitution of Pakistan, 1962 and ask to be released forthwith. Where a period of detention is two months

only and it is not necessary to refer the matter to the Advisory Board, it cannot be argued that the detenu is not entitled to pray for a writ of Habeas Corpus before his case is referred to the Advisory Board. The detenu need not wait for the opinion of the Advisory Board, before asking for a writ of Habeas Corpus ..... (1)

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(1) Maulvi Farid Ahmad v. Govt. of West Pakistan, P.L.D.1965 Lahore 135.

Grounds of Detention and Representation.

Fundamental Right No.2, Clause 5 of Constitution of Pakistan 1962, says:-

"When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order:

Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose."

It is a constitutional obligation on the part of the detaining authority to furnish to the detenu the grounds "as soon as may be" after arrest and afford him the earliest opportunity of making representation against the order. The first obligation constitutes an elementary right in a free democratic State and the second follows as a corollary to the first, for furnishing of grounds would be meaningless, unless the detenu were given a chance of representation.

A "ground," according to the dictionary meaning, is a valid reason. "Grounds" in this context means the bases of the conclusion, leading to the order made by the

detaining authority. The information received constitutes the data on which the conclusions or the "grounds" are based. But the "grounds" must be distinguished from the material in the form of information, confidential communications and other matters by which the detaining authority is moved to take action. The sub-paragraph does not require the detaining authority to communicate to the detenu the sources of information or the actual information received about the detention and his activities ..... (1)

It is the constitutional right of the detenu to obtain all the grounds on which the order of detention against him has been made and none of them can be withheld from him by the Government .....(2) The authority need not disclose all the evidence, but the communication must give the detenu the conclusions, which impelled the authority to take action against him, with sufficient particulars or facts as are necessary, in the circumstances of the case, to enable the detenu to make a representation, which, on being considered may give him relief ...(3) The facts need not

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(1) Narasimhamurty v. State, A.I.R.1951 Orissa 251.

)2) Ghulam Muhammad Khan v. The State, P.L.D.1957 Lahore 497

(3) Ram Krishan v. State of Delhi, A.I.R.1953 S.C.318

be exhaustive but the grounds stated and the particulars supplied must be sufficiently precise, to make it possible for the detenu to make his representation; This is the object of requiring a full disclosure of grounds under the present clause ...(1)

Mere reproduction of the words of the section of the statute under which action has been taken is not a proper compliance with sub-paragraph (5). The authority must disclose in full the grounds upon which action has been taken, subject to the proviso to clause (5) that certain facts may be excluded in the public interest ...(2) If no facts leading to the detention of a detenu are mentioned in the grounds, which are furnished to the detenu, then obviously the intention underlying the enactment of sub-paragraph is frustrated ... (3)

The grounds, on which the authority passes the order of detention, do not necessarily mean the detailed facts on which a prosecution in a Criminal Court may be launched. It is not necessary to mention in the grounds the particulars in the same way as they are mentioned in a

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(1) State of Bombay v. Atmaram, A.I.R.1951 S.C.157

(2) Ibid

(3) In re Magan Lal Jivabhai, A.I.R. 1951 Bom. 33.

charge of a criminal offence but they must be sufficiently clear and precise to enable the detenu to understand what the authority has against him ...(1)

It is the constitutional right of the detenu to obtain all the grounds on which the order of detention against him has been made and none of them can be withheld. In a case(2) under N. W. F. P. Public Safety Act (XXI of 1948) section 3 of which empowered the Provincial Government to arrest and detain any person for any length of time "on being satisfied that he has committed a prejudicial act or that arrest and detention are necessary with a view to prevent the commission of a prejudicial act." The power of the Provincial Government could be delegated to any authority under Section 28 of the Act and had been delegated to the District Magistrate up to a limit of one month's detention. The District Magistrate apprehended that Ghulam Muhammad would cause trouble in his district on the occasion of a visit to Pakistan of Mr. Chou En Lai; after consulting the Chief Minister he passed the following orders,

"With a view to prevent Ghulam Muhammad Khan ... from committing any prejudicial act and from endangering public

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(1) Mohit Lal v. The State A.I.R. 1951 Patna 439

(2) Ghulam Muhammad Khan v. The State, P.L.D.1957 Lah.497.

safety and maintenance of public order, I, Abdul Majid Mufti .... order the arrest without warrant of the said Ghulam Muhammad Khan."

On the 31st December, 1956, the Provincial Government, operating through the Home Secretary, passed another order of detention under Section3 but this was for a period of six months. It was an independent order and had no reference to the previous order of the District Magistrate. The grounds, served on the detenu on the 16th January 1957 were,

"You have been fomenting agrarian trouble between landlord and tenants in Mardan district and inciting the tenants in a manner likely to endanger peace and tranquillity."

It was held by the High Court that the District Magistrate's order was ab initio void. The District Magistrate did not communicate to the detenu the grounds on which the order of detention was based. The grounds furnished by the Home Secretary were not stated in sufficient detail to make an effective representation possible. Originally there were five or six grounds, four of which related to the visit of Mr. Chou En Lai, but the Home Secretary regarded only that set out above

as adequate for a detention order. It was further held that the Home Secretary only issued a formal order. He did not substitute his own satisfaction for the satisfaction of the Chief Minister. Even, therefore, if he was satisfied that the single ground of detention was adequate, the actual detention had resulted from the satisfaction of a different authority, and having been based on several other grounds, the detenu had a right to be supplied with all those grounds. The detention order was held illegal, because the grounds on which action had been taken were not the grounds communicated to detenu, who was consequently deprived of an opportunity of making representation against the order.

In Chandra Sheikhar v. State of Bihar .[1], it was observed that the detaining authority is not at liberty to disclose some and withhold other grounds on which the order of detention has been made. If some of the grounds on which the order of detention has been made are not communicated to the detenu, then he is not in a position to make an effective representation, which he has right to do under clause (5) .. There may be a number of grounds in support of the order, but the authority making the order is entitled to base the order of detention upon some only of the many grounds

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(1) A.I.R. 1951 Pat. 389.

reported to him. It is only those grounds on which the order is made that have to be communicated to the detenu. The safeguard provided by clause (5) is a safeguard in favour of the detenu, and the detenu is entitled as a matter of right to know the grounds on which the order of detention has been made against him; no question of waiver can arise in such circumstances. The detenu is entitled to know only the grounds on which the order is based; it is not incumbent on Government to communicate to the detenu all the grounds it may have in its possession in support of the order.

The question whether the detaining authority was satisfied on sufficient or insufficient grounds in issuing the order of detention is not justiciable.(1)

In State of Bombay v. Atma Ram (2) The Supreme Court of India observed:

"The adjective "supplementary" is capable of covering cases of adding new grounds to the original grounds, of giving particulars of facts already disclosed, and of giving facts in addition to facts mentioned in the grounds originally furnished. It is clear that if by "supplementary grounds" is meant "additional grounds," i.e; conclusions of fact required to bring about the satisfaction of the

(1) Maulvi Farid Ahmad v.Govt.of West Pakistan,P.L.D.1965. Lah. 135.
(2) A.I.R. 1951 S.C.157, Para.15.

Government, the furnishing of any such additional grounds at a later stage will amount to an infringement of the first mentioned right in .. clause (5), as the grounds for the order of detention must be before the Government, before it is satisfied of the necessity for making the order and all such grounds have to be furnished as soon as may be. If "additional grounds" are, in fact, only particulars of facts mentioned or indicated in the grounds previously supplied, or are additional incidents, which, together with the facts mentioned or indicated in the grounds already supplied lead to the same conclusion of the fact (i.e. the "ground" furnished in the first instance) the matter stands on a different footing. These are not new "grounds," within the meaning of the first part of ...clause (5).

While the first mentioned type of "additional grounds" cannot be given, after the grounds have been furnished, the other type, even if furnished after the grounds have been furnished, provided they do not affect the right of the detained person to make a representation, will not be considered an infringement of either of the rights mentioned in clause (5). While the authority must discharge the duty to furnish grounds for the order of detention 'as soon as may be' and also provide 'the earliest opportunity to make

representations,' the number of communications from the detaining authority to the detenu may be one or more and they may be made at intervals, provided the two parts of the aforesaid duty are discharged in accordance with the wording of clause (5). So long as the latter communications do not make out a new ground, their contents are no infringement of the rights of the detenu mentioned in the clause. They may consist of a narration of facts or particulars relating to the grounds already supplied, but in doing so the time factor in respect of the second duty, viz; to give a detained person the earliest opportunity to make a representation cannot be overlooked ... "
The grounds cannot be subsequently amplified or clarified. In short, though new "grounds" cannot be added, there is nothing to bar the communication of particulars or facts relating to the grounds already supplied, by one or more subsequent communications, provided the "earliest" opportunity of making a representation is not denied.

In another case (1) the original ground supplied was :- "You tried to create disorder amongst tenants in Una Tehsil by circulating and distributing objectionable literature issued by the underground communists," and subsequently,

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(1) Ujagar Singh v. State of Punjab, A.I.R.1952, S.C.350.

the following grounds were furnished by way of supplementary grounds:-

"You were responsible for hartal by labourers working on Bhalera Dam" .... "You instigated labourers working in Nangal in 1948 to go on strike." .....

The grounds subsequently supplied were "new" or "additional" grounds having no relation to the original grounds. Hence the validity of the detention order could not be founded upon these additional grounds, and they were eliminated from consideration.

Where the subsequent communication does not contain new grounds but particulars of the general allegation contained in the grounds originally communicated, the particulars should be taken into consideration, in determining whether the detenu has been furnished with sufficient information to enable him to make a representation, but where the particulars are supplied after an inordinate delay, such as four months after the order of detention, it was held that the detenu had been denied the earliest opportunity of making representation, that there had been a violation of .. clause (5), and the detention was unconstitutional ....(1)

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(1) Ujagar Singh v. State of Punjab, A.I.R.1952 S.C.350.

A description of the contents of the second communication of the grounds for detention as "supplementary grounds" does not necessarily make them additional or new grounds. One has to look at the contents to find out whether they are new grounds. When they only furnish details of the grounds furnished to the detenu previously, they cannot be treated as new grounds. Further, the fact that the details were communicated later does not necessarily show that they were not within the knowledge of the authorities, when they sent the first communication of the grounds.(1)

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(1) Tarapada v. State of West Bengal, A.I.R.1951 S.C.174.

Particulars :-

The grounds must be exact and precise and sufficient particulars regarding grounds must be given to enable the detenu to make a representation. Furnishing grounds is not a mere formality; it is intended to serve the ends of justice by giving the person deprived of his liberty adequate information of the case against him, so that he is able to give, if possible, an explanation calculated to secure his release.(1)

"Particulars" are distinct from "grounds." "Grounds" are the reasons for his detention. They are inferential deductions from facts reported and they must be sufficient to justify the detention order in the interest of the general public. In order to afford the detenu an opportunity to be heard in his defence, acts of the detenu bearing a proximate relation to a ground must be given as part of the ground, the ambit of which must be determined on the particular facts of each case. The rules, in this connection, must be flexible, rather than hard and fast. In this view of the matter, the facts, illustratively stated, are incidents, events and

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(1) Mrs. Rowshan Bijaya Shaukat Ali Khan v. Govt. of East Pakistan, P.L.D. 1965 Dacca 241.

circumstances, informations, suspicions, conjectures and the like, including the sources of informations and agencies set up in that behalf; they may constitute the background, which determines the nature and character of the acts manifesting the grounds that make detention necessary. They may amount to proofs that set the machinery in motion. They are zealously guarded by the Legislature against disclosure .... (1)

Although there is no express provision in Right Number 2 that particulars of the grounds of detention must be given to the person detained, the furnishing of particulars may be necessary in order to enable the detenu to make an effective representation.

The Supreme Court of India in State of Bombay v. Atmaram (2) analysed the whole position in the following words :-

"The first part of Article 22, clause (5) gives a right to the detained person to be furnished with "the grounds on which the order has been made" and that has to be done "as soon as may be." The second right given to such person is of being afforded "the earliest opportunity of making a representation against the order." It is obvious that the

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(1) Narasimhamurty v. State, A.I.R.1951 Orissa 251.

(2) A.I.R. 1951 S.C.157

grounds for making the order as mentioned above, are the grounds on which the detaining authority was satisfied that it was necessary to make the order. These grounds therefore must be in existence when the order is made. By their very nature the grounds are conclusions of facts and not a complete detailed recital of all the facts. The conclusions drawn from the available facts will show in which of three categories of prejudicial acts the suspected activity of the particular person is considered to fall. These conclusions are the "grounds" and they must be supplied. No part of such "grounds" can be held back nor can any more "grounds" be added thereto. What must be supplied are the "grounds on which the order has been made" and nothing less..."

"The second right, of being afforded "the earliest opportunity of making a representation against the order," is not confined to only a physical opportunity by supplying paper and pen only. In order that a representation can be made, the person detained must first have knowledge of the grounds on which the authorities conveyed that they were satisfied about the necessity of making the detention order. It is therefore clear that, if the representation has to be intelligible to meet the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain that object ... While the grounds of

detention are thus the main factors on which the subjective decision of the Government is based, other materials on which the conclusions in the grounds are founded could and should equally be conveyed to the detained person, to enable him to make out his objections against the order. To put it in other words the detaining authority has made its decision and passed its order. The detained person is then given an opportunity to urge his objections, which, in case of preventive detention, comes always at a later stage. The grounds may have been considered sufficient by the Government to pass its judgment. But to enable the detained person to make his representation against the order, further details may be furnished to him. In our opinion, this appears to be the true measure of the procedural rights of the detained person under Article 22 (5)."

Thus, though the Constitution does not lay down any obligation to give 'particulars or details' and leaves it to the discretion of the authority to disclose or withhold facts, it cannot be held that a mere recital of the clauses of the statute, without giving any particulars of details, would suffice, for, without any particulars, it is not possible to make a representation, which is the very object

of communicating the grounds.(1) The detenu is not entitled to know the evidence, nor the source of information, but he must be furnished with the grounds for his detention and sufficient details to enable him to make out a case, if he can, for the consideration of the detaining authority.(2) The mere statement that the detenu had been carrying on 'subversive propaganda' conveys no precise information to the detenu, so as to enable him to make a proper representation.(3) Similarly, an allegation of 'secret or underground activity', without particulars as to the nature of such activities, is vague, for 'secret activity' does not necessarily mean that it is an activity subversive of public order.(4)

The same view was reiterated by Supreme Court of India in the case of Dr. Ram Krishan (5) in the following words:-

" ..... Preventive detention is a serious invasion of

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(1) State of Bombay v. Atmaram, A.I.R.1951 S.C.157

(2) Durgadas v. Rex A.I.R.1949 ALL.148, 151.

(3) In re Krishanaji, A.I.R.1948 Bomb. 360.

(4) Nek Mohammad v. Emperor, A.I.R.1949 Pat. 1.

(5) Dr.Ram Krishan v. State of Delhi, A.I.R.1953 S.C.318

personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court.... the petitioner has the right, under Article 22(5), as interpreted by this court by a majority, to be furnished with particulars of the grounds of his detention "sufficient to enable him to make a representation, which, on being considered, may give relief to him ...; this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under clause (6) of Article 22. That not having been done in regard to one of the grounds mentioned in ... the statement of grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law, within the meaning of Article 21. The petitioner is, therefore, entitled to be released .... " Even where the grounds or the "basic facts" have been furnished, the detenu may require further particulars or details, in order to enable him to make an effective representation, or the particulars supplied may be vague so that further information becomes necessary. In such a case the Supreme Court has held that it is for the detenu to ask for such particulars as are necessary to enable him to make

a representation, after the detaining authority has discharged its duty to communicate the 'grounds' as required by the earlier part of clause (5) of Article 22. (1, 2) If he does not ask for such particulars, his conduct may, in particular circumstances, be taken into consideration in deciding whether the grounds can be considered to be vague.(2,3)

Where a number of grounds are furnished to the detenu as forming the basis of detention, he must be supplied sufficient particulars about each ground to enable him to make the representation against the order, for the Advisory Board might recommend the continuance of detention on the basis of a vague ground, about which sufficient particulars were not furnished to the detenu, and about which the detenu could not make an effective representation to the Advisory Board to carry conviction with it. (4)

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(1) Naresh v. State, A.I.R. 1959 S.C.1335 (1340)

(2) D'Souza v. State of Bombay, A.I.R. 1956 S.C.382 (390).

(3) Ujagar Singh v. State of Punjab, A.I.R. 1952 S.C.350

(4) Dr. Ram Krishan v. State of Delhi, A.I.R.1953 S.C.318.

Delays.

The communication of grounds "as soon as may be" is not sufficient. The particulars must also be furnished within a reasonable time, for without particulars the detenu would not be able to exercise his constitutional right of making effective representation. Where there is unexcusable delay in furnishing particulars, the detenu would be entitled to be released,(1) although the determination of the unreasonableness of the delay would depend upon the facts of each case.(2)

In Atmaram's case,(3) Kania, C.J. did not definitely indicate the time within which the particulars, where they were necessary, should be communicated. His Lordship merely observed that Article 22 (5) prescribed two different time factors in respect of the furnishing of 'grounds' and of 'particulars;' while 'grounds' were to be furnished 'as soon as may be' after the order of detention, 'particulars' should be furnished in such time that the detenu gets the 'earliest opportunity of making representation.' The position was left uncertain by the comment - "However, the second communication should not be liable to be charged as not being

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(1) Ujagar Singh v.State of Punjab, A.I.R.1952 S.C.350
State of Bombay v. Atmaram, A.I.R.1951 S.C.157.

(2) 1952 S.C.350

(3) A.I.R. 1951 S.C.157

within the measure 'as soon as may be.' What seems to have been meant by this is that the particulars could be furnished some time later than the grounds. But the question what degree of delay in furnishing the particulars would be upheld by the court, remains uncertain.

When the subsequent communication does not contain new grounds but only particulars of the general allegation contained in the grounds originally communicated, the particulars should be taken into consideration in determining whether the detenu has been furnished with sufficient information to enable him to make a representation, but where the particulars are supplied after an inordinate delay, say four months after the order of detention, the detenu has been denied the earliest opportunity of making representation, so that there is a violation of Article 22 (5), and the detention is unconstitutional..(1)

Vague Grounds

What is meant by 'vague'? 'Vague' can be considered as the antonym of 'definite'. If the ground which is supplied is incapable of being understood or defined with sufficient certainty, it is 'vague;' it is not possible to say anything more definite on the question what is vague; it must vary

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(1) Ujagar Singh v. State of Punjab, A.I.R.1952 S.C.350.

according to the circumstances of each case. It is however, improper to contend that a ground is necessarily vague, if the only answer which the detained person can make is a denial. That is a matter which has to be examined in the light of the circumstances of each case. If, on reading the ground furnished, it is capable of being intelligently understood and is sufficiently definite to enable the detained person to make a representation against the order ofdetention, it cannot be called vague. If the language used in specifying the ground is so general that the detained cannot meet the charge against him except by a denial, it is at least arguable that it is too vague. It may be contended that, having regard to the general language used in the ground, the detenu has not been given the earliest opportunity to make a representation against the order of detention. The representation mentioned in the second part of Article 22(5) must be one which, on being considered, may give relief to the detained person." ...(1)

In a later case (2) the principles laid down in the above mentioned case were summarised as follows :-

"If the representation has to be intelligible to meet

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(1) State of Bombay v. Atmaram, A.I.R. 1951 S.C.157

(2) Ram Singh v. State of Delhi, A.I.R.1951 S.C.270.

the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain the object. While there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have the earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. For the first, the test is whether it is sufficient to satisfy the authority; for the second, the test is whether it is sufficient to enable the detained person to make the representation at the earliest opportunity."

In the case of Ujagar Singh (1) Aiyar J. summarised the principles as under :-

"(a) That mere vagueness of grounds standing by itself and without leading to an inference of mala fides or lack of good faith is not a justiciable issue in a court of law for the necessity of making the order, in as much as the ground or grounds on which the order of detention was made is a matter for the subjective satisfaction of the Government or of the detaining authority.

(b) That there is nothing to prevent particulars of grounds being furnished to the detenu within a reasonable

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(1) Ujagar Singh v. State of Punjab, A.I.R.1952 S.C.350.

time, so that he may have the earliest opportunity of making a representation against the detention order, what is a reasonable time being dependent on the facts of each case.

(c) That failure to furnish grounds with the speedy addition of such particulars as would enable the detenu to make a representation at the earliest opportunity against the detention order can be considered by a court of law as an invasion of a fundamental right or safeguard guaranteed by the constitution, viz; being given the earliest opportunity to make a representation.

(d) That no new grounds could be supplied to strengthen or fortify the original order of detention."

The beneficial effect of the decision in Atmaram's case, however, has been curtailed to a substantial extent by the majority decision in the later case of Ram Singh, to the effect that, though the detenu has a right to be furnished with sufficient materials to enable him to make an effective representation, it is not necessary for the detaining authority to communicate to the detenu the exact words used by the detenu or their substance by reason of which the order is being made.

In Abdul Rahim v. State,(1) the Rajasthan High Court

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(1) Abdul Rahim v. The State, A.I.R. 1952 Raj. 33.

appears to have correctly held that, where various grounds had been furnished, giving considerable detail as to the activities and the places where they had been carried on and the detenu had, in his representation, denied all these allegations, without any misgiving as to the nature of allegations, the detenu cannot subsequently be heard to complain that the grounds were vague for omission to state the dates of the activities alleged.

But it must be remembered that "A layman, who is not experienced in the interpretation of documents, can hardly be expected without legal aid, which is denied to him, to interpret the grounds in the proper sense. It is therefore, up to the detaining authority to make his meaning clear beyond doubt, without leaving the person detained to his own resource for interpreting them. Otherwise such grounds would be regarded as vague, so as to render it difficult, if not impossible, for the petitioner to make an adequate representation."(1)

In the following cases, the grounds have been held to be vague :-

1) In Mrs. Rowshan Bijaya's case (2), the grounds

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(1) Dr. Ram Krishan v. The State of Delhi, A.I.R.1953 S.C.318.

(2) Mrs. Rowshan Bijaya Shaukat v. Govt. of East Pakistan, P.L.D.1965 Dacca 241.

furnished were, "That you have been and are associated with the illegal activities of a secret association in the districts of Dacca, Mymensingh, Bogra and Jessore and that during the years 1957, 1958, 1959, 1961, 1962, 1963 and 1964 (till your arrest and when you were not in Jail) you were concerned in prejudicial activities in the districts of Dacca, Mymensingh, Bogra, Jessore and that particularly in the months of July, August and October 1957; February, April, May, June, July, November 1959; April, July 1961; May, June, August and November 1962; April, July, August, October and November 1963; February, March, May, June and September 1964; (till your arrest and when you were not in Jail) you carried prejudicial acts and propaganda against the Government among the people, including the students and peasants, with the ulterior object of disrupting the stability or integrity of the Province of East Pakistan and exciting disaffection towards the Government established by law." It was held that, "this ground says that the detenu has been associated with the activities of secret associations in the districts of Dacca, Mymensingh, Bogra, and Jessore during the years 1957, 1958, 1959, 1961, 1962, 1963 and 1964 excepting the period of his detention in the Dacca Central Jail.

(These allegations are indeed vague and they give no

clear indication as to the charges made against him to enable him to make a representation, which the constitution guarantees him.)

2) "In pursuance of the Policy of the Communist party, you are engaged in preparing the masses for violent revolutionary campaign and attended secret party meetings to give effect to this programme ..."(1)

3) "You tried to create public disorder amongst tenants in Una Tehsil by circulating and distributing objectionable literature issued by underground communists ..."(2)

4) "That you, along with your associates, have been collecting and are likely to collect arms and ammunitions illegally for illegal purposes and illegal activities ..."(3)

5) That the petitioner was a member of the Communist Party and is likely to go underground to further plans of the Communist Party, viz: commission of sabotage and violence. The grounds were held to be vague for omission to state when, where, and with whom he was going to plan..(4)

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(1) Ujagar Singh v. State of Punjab, A.I.R.1952 S.C.350.

(2) Ibid.

(3) Sushila v. Commissioner of Police A.I.R.1951 Bom.252

(4) Kulomoni v. The State, A.I.R.1950 Orissa 20.

6) That the applicant's "local reputation is so bad that he is known as a smuggler and profiteer..."(1)

7) That the petitioner organised two illegal strikes. The grounds were held to be vague as there was no mention of date, and no particulars as to place or places where alleged strikes were said to have occurred, nor of the persons against whom they were alleged to have been directed..(2)

8) That the detenu was an active worker of the Muslim League and had been carrying on communal activities amongst Muslim labourers in West Bengal and in certain areas in particular, with a view to creating disorder and bringing about dislocation in the industries and thus paralysing the administration .. (3)

In the following cases the grounds have been held not to be vague :-

(i) That he threatened public peace and tranquillity in a certain district by urging violent methods, especially among the labour classes and that his speeches at public meetings and demonstrations were prejudicial to the maintenance of

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(1) Raman Lal v. Commissioner of Police, A.I.R.1952 Cal.26, 29.

(2) Prem Dutta v. Supdt. Central Prison, A.I.R.1954 All.315.

(3) Safat Ullah Khan v. Chief Secretary, West Bengal Govt. A.I.R.1951 Cal.194.

public order in that district ...[1]

(ii) That the petitioner was a member of the Communist Party of India, which was spreading a doctrine of violence to acquire power and that though since 1950, the party had been divided into two groups by changing its draft programme, in fact, the change was a mere camouflage and the party was carrying on loot. (The grounds do not become vague for failure to mention to which group the petitioner belonged ...[2]

(iii) That you have been assisting the operations of the Communist Party of India ... which has for its object commission of rioting with deadly weapons ... thus acting in a manner prejudicial to the maintenance of public order; that as member of the Communist Party of India you have fomented trouble amongst the peasants of the Howrah district .. and amongst the tramways men and other workers at Calcutta,"

and in continuation of these grounds, instances of meetings and processions with dates were furnished, illustrating the attempt to foment trouble amongst workers .. [3]

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(1) Benoy v. Govt. of Assam, A.I.R.1950 Assam 49

(2) Sheobachan v. State of Bihar A.I.R.1952 Pat. 177

(3) Tarapada v. State, A.I.R.1951 S.C.174.

(iv) "Your activities generally and particularly since the recent trouble in East and West Bengal have been of a communal nature, tending to excite hatred between communities and, whereas, in the present composition of the population of Delhi and the recent communal disturbances of Delhi, feelings are aroused between the majority and minority communities, your presence and activities in Delhi are likely to prove prejudicial to the maintenance of law and order, it is considered necessary to order you to leave Delhi. ..."(1)

(v) Where the grounds singly and far more so collectively, were conclusions drawn from the available facts, showing that suspected activities of the detained persons fell within the category of prejudicial acts affecting the maintenance of supplies essential to the community, and though not all the 'grounds' were equally full, but even in the case of the 'grounds' with the fewest details, they were capable of being intelligently understood and were sufficiently definite to furnish materials to enable the detained persons to make a representation against the respective orders of detention, the only answer of the detenus to the grounds being to deny them, the grounds

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(1) Dr. N.B.Khare v. The State of Delhi, A.I.R.1950 S.C.211.

were not necessarily vague on that account only ...(1)

(vi) Where the first sentence in the grounds supplied to the detenu only alleged his association with a gang headed by a certain named person wanted by the police in 15 cases of murder and dacoity, but in the same paragraph the grounds continued with the words "amongst the many acts of your association and assistance, a few specific acts are mentioned below" which were followed by details of three recent occasions on which the detenu had been seen in the company of that leader of the gang, the ground was held not to be vague, though the first sentence taken by itself might possibly be regarded as somewhat vague ...(2)

Where the grounds are vague and give no clear indication of the charges made against the detenu to as to enable him to make the representation, which the Constitution guarantees him, the court will set the detenu at liberty ..(3)

The Supreme Court of India, in an earlier case, held that

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(1) Shri Krishna Sharma v. State of West Bengal, A.I.R.1954 Cal.581

(2) Shri Krishna Sharma v. State of West Bengal, A.I.R.1954 Cal.581

(3) Mrs.Rowshan Bijaya v. Govt.of East Pakistan, P.L.D.1965 Dacca 241.
Safat Ullah v. Chief Secretary, A.I.R.1951 Cal.194.

"When the grounds supplied to the petitioner at the time of order are so vague (apart from question of technical defects) as prevents the detenu to make representation at "the earliest opportunity" ..Clause (5) is infringed and this renders the detention order void ab initio.(1)

In Ujagar Singh's case (2) the Supreme Court again held that mere vagueness of grounds standing by itself, without leading to an inference of mala fides or lack of good faith, is not a justiciable issue in a Court of law for the necessity of making the order, in as much as the ground or grounds on which the order of detention was based, is a matter for the subjective satisfaction of the Government or of the detaining authority.

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(1) State of Bombay v. Atmaram, A.I.R.1951 S.C.157

(2) Ujagar Singh v. State of Punjab, A.I.R.1952 S.C.350.

Irrelevant Grounds.

A distinction must be made between "irrelevant" and "vague" grounds. "Irrelevant" means not relevant to the object of the legislation and has no connection at all with the satisfaction of the authority, whereas "vague" grounds are such as are not sufficiently clear to enable an effective representation to be made.

If one of the several grounds supplied to the detenu be either irrelevant or vague or non-existent, the detention is invalid.(1) Thus :-

(a) If any of the grounds or reasons that lead to the satisfaction is 'irrelevant', the detention would be invalid, even if there are other relevant grounds, because it can never be certain to what extent the defective grounds operated on the mind of the authority or whether the detention order would have been made, if only one or more valid reasons had been before him.(2) In such a case, the court is bound to quash the order, unless it can be predicated that the defective ground was of an unsubstantial or inconsequential nature. Where the detention order

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(1) Rehmat Illahi v. Govt.of West Pakistan, P.L.D.1965 Lah.112.
Dwarka Das v.State of J. & K. A.I.R.1957 S.C.164
Shibban Lal v.State of U.P., A.I.R.1954 S.C.179

(2) Keshav Talpade v. Emperor, 1943 F.C.I.

stated that detention was necessary to prevent the petitioner from acting in a manner prejudicial to the provision of supplies and services, essential to the community and it was alleged that petitioner was smuggling essential goods, such as shaffon cloth, zari and mercury, and it was found that shaffon cloth and zari had not been declared "essential goods," the order was quashed.(1) In Prem Dutta's case(2), it was held that, where good grounds for detention had been mixed up with vague, indefinite and bad grounds, the petitioner's detention could not be held to be in accordance with procedure established by law.

(b) No doubt, the grounds are to read together(3) but the detenu, who is denied legal aid, cannot be expected to interpret a vague ground in the light of another ground, as a lawyer would have done, according to the rules of interpretation of documents. The first paragraph of the statement of grounds stated :-

"The Jan Sangh etc. have started an unlawful campaign

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(1) Dwarka Das v. State of J. & K., A.I.R.1957 S.C.164

(2) Prem Dutta v. Supdt. of Central Prison A.I.R.1954 All.315.

(3) Shamrao v. D.M.Thana, A.I.R.1952 S.C.324

Ram Krishan v. State of Delhi, A.I.R.1953 S.C.318.

in sympathy with the Praja Parishad movement of Kashmir for defiance of the law, involving violence ..." as evidenced by sub-paragraphs (a) which referred to incidents which are said to have ranged from the 4th to the 10th March 1953, but they did not directly implicate the petitioner. The second paragraph showed how the petitioner was concerned in these activities :-

"The following facts show that you are personally helping and actively participating in the above mentioned movement, which has resulted in violence and threat to maintenance of public order."

Of the several paragraphs which followed, sub-paragraph (e) stated :-

"You have been organising the movement by enrolling volunteers among the refugees in your capacity as President of the Refugee Association of the Bara Hindu Rao, a local area in Delhi."

It was held that the particulars given in sub-paragraph (e) were vague, as they omitted to mention the time of this activity. The contention that, if the grounds were read as a whole, they could reasonably be taken to mean that the petitioner was organising the movement by enrolling volunteers from the 4th to the 10th March, was rejected on

the ground that the petitioner, who was a layman, could not be expected to interpret the grounds as a lawyer would interpret a document ..(1)

(c) The same principle is applicable to the case when one of the several grounds communicated to the detenu is non-existent, as found by the Advisory Board or admitted by the detaining authority.(2) Thus, where an order of detention was made on two grounds and the Advisory Board held that one of the two grounds was non-existent but confirmed the order on the other ground and the Government issued an order confirming the detention order on the latter ground, the Supreme Court held the detention order to be void.

(d) But in applying the above principles the court must be satisfied that the vague or irrelevant or non-existent grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some ground or reason of a comparatively unessential nature is defective that such an order based on subjective satisfaction can be held to be invalid.(3)

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(1) Ram Krishan v. State of Delhi, A.I.R.1953 S.C.318

(2) Dwarka Das v. State of J. & K., A.I.R.1957 S.C.164.

(3) Shibban Lal v. State of U.P., A.I.R.1954 S.C.179.

The reason underlying the foregoing principle was explained in the instant case :-

"Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. That is so because the matter, being one for subjective satisfaction, it must be properly based on all the reasons on which it purports to be based. If some out of them are found to be non-existent or irrelevant, the Court cannot predicate what the subjective satisfaction of the said authority would have been on the exclusion of these grounds or reasons. To uphold the validity of such an order in spite of the invalidity of some of the reasons or grounds, would be to substitute the objective standards of the Court for the subjective satisfaction of the statutory authority. In applying these principles, however, the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some

ground or reason of a comparatively unessential nature is defective that such an order based on subjective satisfaction can be held to be invalid. The Court, while anxious to safeguard the personal liberty of the individual, will not lightly interfere with such orders."

Being a member of Jama'at, which had been guilty of prejudicial activities is, by itself, not sufficient ground to take action against the person.(1) While mere belief in or acceptance of any political ideology may not be ground for detention, affiliation to a party, which is alleged to be spreading its "doctrine of violence rendering life and property insecure and trying to seize power by violence" may, in certain circumstances, lead to an inference that the person concerned is likely to act in a manner prejudicial to the public safety, order or tranquillity. The fact that the party has not been outlawed is not material, for that is a matter of expediency.(2) Affiliation to the Communist party, which is not banned but whose objects are said to be the overthrowing of Government by subversive and territorial activities, would have a relation to the security of the state and the maintenance of public order and would afford

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(1) Rehmat Elahi v. Govt. of West Pakistan, P.L.D.1965 Lah.112

(2) Machindar Shivaji v. The King, 1950, F.C.129

ground for detention of the person.[1]

It has been observed that,[2] "When nothing else is known, a mere membership of the Communist Party, if it has not been declared an unlawful body, would not attract the provisions of the Preventive Detention Act. In all the democratic states it is essential that the citizens should be made conversant with the pros and cons of every political system and every political ideology, and, so long as a party organisation merely tries to place its own views before the people, it does not matter and a court cannot in such a case interfere with the activities of that party, as long as they are confined to the limits mentioned above. The broadcasting and the preaching of the philosophy and the ideology of a party, like the Communist Party would not justify an interference by the Government with the activities of that organisation but once such an organisation, in attempting to achieve its object, has recourse to activities of a violent nature, resulting in danger to public safety, the Government would step in to stop the organisation from carrying on its activities. Spread of disaffection against a Party Government cannot be regarded as amounting to

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(1) Narayana Raju v. Secretary, Govt.of Madras, A.I.R.1951 Mad.182

(2) Maqdoom v. State of Hyderabad, A.I.R.1952 Hyd. 112.

interference with the maintenance of public order in democratic government, because it is the right of every citizen to criticise the existing Government and bring into disrepute the existing Government, if he believes that the Government is acting against the interests of the public at large. This right of the citizen is always subject to this condition, that the criticism does not transgress the limits of public order or that disaffection does not develop into recourse to unlawful methods, rendering unsafe security of life and property. Where, therefore, members forming part of an organisation are known to indulge in acts of violence and brutality and a person is a member of such organisation, it is sufficient to raise a suspicion in the mind of the Government that, if such person were allowed to be at large, he is likely to act in a manner prejudicial to the safety of the public."

Mala Fides.

The High Court in exercise of its writ jurisdiction, can go into the question whether the grounds on which a person was detained, fall within the terms of law under which action was taken.(1) An order of detention is mala fide if it is made for a "collateral" or "ulterior" purpose, i.e., a purpose other than what the Legislature had in view in passing the law of preventive detention, such as prevention of acts prejudicial to the security of State and the maintenance of public order. There is a mala fide exercise of the power, if the grounds upon which order is based are not proper or such grounds as would justify detention under the provisions of the Act itself,(2) or when the grounds alleged for the detention are not relatable to the objects of detention or are non-existent, or where such detention on the part of the detaining authority is proved to be of a mala fide character.(3) If a District Magistrate, for example, detains a person under a Preventive Detention law, because the detenu was having an

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(1) Farid Ahmad Khan v. Govt.of West Pakistan, P.L.D.1965 Lah.135

(2) Gopalan v. State of Madras, A.I.R.1950 S.C.27

(3) Miraj Muhammad Khan v. Govt.of Pakistan, P.L.D. W.P. 283.
Abuzar v. Province of West Pakistan, P.L.D.1966 Kar.260.

affair with the District Magistrate's wife, the order would have been made mala fide. The action was prompted by ulterior and extraneous reasons. In order to prove this charge, the detenu would have to show that the reasons given by the authority for making the order were not the reasons which in fact motivated the action.

Bad faith in legal terminology is called "malice in law" as distinguished from "malice in fact." Lord Haldane gave a good description of distinction between malice in law and malice in fact in Shearer v. Shields.(1) "Between 'malice in fact' and 'malice in law' there is a broad distinction, which is not peculiar to any system of jurisprudence. The person who inflicts a wrong or an injury upon a person in contravention of the law is not allowed to say that he did so with an innocent mind. He is taken to know the law and can only act within the law. He may therefore be guilty of 'malice in law', although, so far as the state of mind was concerned, he acted ignorantly and in that sense innocently. 'Malice in fact' is a different thing. It means an actual malicious intention on the part of the person who has done the wrongful act."

The doctrine of 'malice in law' was invoked in

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(1) Shearer v. Shields, 1914 A.C.808.

Vimlabai Desapande v. Emperor[1]. It was pointed out that :-

"If either the Police or the Provincial Government desire an investigation into an offence, whether under the Penal Code or under the Defence of India Rules, then they are bound to conduct that enquiry in accordance with the provisions of the Criminal Procedure Code. They cannot call in aid their powers of detention and, under the guise of exercising these powers, conduct a secret investigation into a crime. If they have information that these detenus have committed crimes or offences, they are not bound to investigate into them. They can rest content with detaining them under R.26 or R.129. But if they want an investigation, they must proceed in accordance with the provisions of the Criminal Procedure Code. If they do otherwise, it is a fraud upon the Act and their action is not taken in good faith. They cannot make the best of both words. The expression 'good faith' as used here is akin to 'malice in law.' "

Though Section 16 of the Defence of India Act lays down that no order made in exercise of any power conferred by or under the Act shall be called in question in any Court, yet this did not preclude the Court from deciding whether a power had been conferred or whether a power which had been conferred had been abused.[2] The previous section, section 15

(1) A.I.R.1945 Nag. 8.

(2) Kewal Ram v. Collector of Madras, A.I.R.1944 Mad.285

was directory and must be read in conjunction with section 16. Section 16 requires that the order should be passed in exercise of the power conferred by the Act and not merely a colourable exercise of such powers. It is not enough that the orders should be passed under a colour of the power conferred. They must be done in actual exercise of it and no power is conferred to make such orders in bad faith, or in abuse of the Act and consequently these issues must be investigated if they are raised.(1)

In the case of Emperor v. Sibnath Banerji,(2) it was observed by their Lordship of the Privy Council that, "It cannot be said that the High Courts have no jurisdiction, in view of section 59(2) of the Constitution Act and section 16 (1) of the Defence of India Act, to investigate the validity of orders of detention made under Rule 26 of the Defence of India Rules. Section 59 (2) of the Constitution Act only relates to one specified ground of challenge, namely that the order or instrument was not made or executed by the Governor and section 16 (1) of the Defence of India Act, which assures that the order is made in the exercise of the power, clearly leaves it open to challenge on the ground that it was not made in conformity

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(1) Harish Chandra v. Emperor, A.I.R. 1943, All.277

(2) Emperor v. Sibnath Banerji, A.I.R. 1945 P.C.156.

with the power conferred. In either case, no doubt, the burden of proof lies heavily on the challenger to produce admissible evidence, sufficient to establish a prima facie case as to the inaccuracy of the recital in the orders of detention.

Similarly, if the detenu can show that the Governor acted under a misapprehension as to the extent of the powers entrusted to him or did not in fact order detention of the detenu with a view to "preventing him from acting in a manner prejudicial to the public order," but with some ulterior object, such as to regularize his illegal detention or to punish him for acts, which he had already done, rather than to prevent him from doing, or for investigating the doing of, similar acts again, he would be entitled to be released. In such a case it could not be said that the Governor had in law acted in good faith, and the order of detention would be practically a sham order and it must be set aside.

In Ali Gohar v. Emperor[1] the Peshwar Judicial Commissioner's Court considered the scope of section 491 of Criminal Procedure Code, with reference to section 60, 40, 47 of the Frontier Crimes Regulation 3 of 1901. It was held

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(1) Ali Gohar v. Emperor, A.I.R. (32) 1945 Peshwar 12.

that, even if the person applying to the Court of Judicial Commissioner under section 491, Criminal Procedure Code was arrested under section 40 of the Regulation, section 60 did not deprive the Court of jurisdiction to consider the application and interfere, if the arrest was not made under the Regulation but was made mala fide and without any legal authority whatever. By reason of section 47 of the Regulation, section 114, Criminal Procedure Code applied to proceedings for taking security under section 40 of the Regulation and in as much as, under Section 114, Criminal Procedure Code, the only way in which persons can be brought before the Court under arrest for the purpose of security being taken was by means of a warrant issued by a Magistrate, the arrest of a person for purpose of taking security under section 40, without any warrant for their arrest having been issued by the proper authority, was illegal.

An order of detention cannot be made for an ulterior motive or for a collateral purpose. The detaining authority must only consider the objects for which the Act was passed and the only considerations which must weigh with the detaining authority are those laid down in the Act, such as public safety, maintenance of public order and the preservation of peace and tranquillity. If in making the order the mind of the authority is influenced by any

consideration extraneous to the Act, the order is bad and cannot be upheld.(1)

(a) In Abuzar's case,(2) detention orders were set aside as being mala fide, where the grounds for detention had been stated to be distribution of a poster, allegedly containing material prejudicial to public order. But in fact, the contents of the posters were no more than an election manifesto on behalf of combined opposition parties against a candidate of the ruling party and were not, as such, likely to incite the general public to commit acts of violence or breaches of peace; the grounds for detention were not relatable to the statutory purpose of detention and were accordingly non-existent.

(b) In Dhruvaraj's case,(3) where the petitioner's affidavit set out allegations that the action of the Commissioner of Police of Bombay was the result of the desire of the U. P. Police to apprehend him and that it was not the bona fide act of the Commissioner of Police himself, based on any reasonable suspicion entertained by himself; the motive was to hand over the detenu to the custody of the U.P. Police, These allegations were not traversed in the counter-affidavit

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(1) Maledath v. The Commissioner of Police, A.I.R.1950 Bomb.202

(2) Abuzar v. Province of West Pakistan, P.L.D.1966 Kar.260

(3) Dhruvaraj v. Vishwanath Singh, A.I.R.1946 Bomb.65.

filed by the prosecution and there was an order of the Bombay Government directing that the detenu be removed to Lucknow and delivered to the U. P. Police. It was held that what the Commissioner of Police of Bombay purported to do was not bona fide; the arrest was actuated by indirect motives and was a fraud on the power invested in the Commissioner of Police under Rule 128(1) Defence of India Rules, and therefore the order of detention passed by the Bombay Government was illegal.

(c) In Gopalan's case,[1] the court reserved judgment in an application for habeas corpus against an order of detention and three days later delivered judgment making the rule nisi absolute. During this interval, Government had a conference with its legal advisers and came to the conclusion that the petitioner would, in all probability, be released by the Court, on account of a technical defect in the form of the order and so passed a subsequent order of detention, which, however, was not brought to notice of the Court. Within a few minutes of the delivery of judgment, the petitioner was rearrested under the subsequent order of detention. It was held that the subsequent order, not having been communicated to the Court, lacked bona fides

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(1) Gopalan v. State of Madras, A.I.R.1950 S.C.27.

and was made solely with the object of defeating the order of the Court, during the pendency of the petition against the previous order.

(d) The petitioner was detained in jail as an under-trial prisoner in three cases for about six months. In one of them he was acquitted and in another discharged. Immediately after this, while the third case was still pending, he was served with an order of detention under the Preventive Detention Act, based on the ground of his activities extending for a period of two years prior to his detention as an under-trial prisoner. It was held that the order of preventive detention was made for a collateral purpose, either to punish him for his past acts or to prejudice his defence in the pending case. Hence, the order was mala fide and illegal.(1) It is improper to issue an order under the Preventive Detention Act, when a person is already under detention under the ordinary law and awaiting his trial.(2)

If either the Police or the Provincial Government desires an investigation into an offence, whether under Penal Code or under Defence Rules, then they are bound to

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(1) Ishar Singh v. The State, A.I.R. 1953, Pepsu 111.

(2) Rameshwar v. D.M. A.I.R. 1964 S.C.334 (337).

conduct their enquiry in accordance with the provisions of the Criminal Procedure Code. They cannot call in aid powers of detention and, under guise of exercising those powers, conduct a secret investigation into a crime. If they have information that detenus have committed crimes they should investigate them. They can rest content with detaining the suspects under Rule 26 or Rule 129, but if they want an investigation, they must proceed in accordance with the provisions of the Criminal Procedure Code. If they do otherwise, it is a fraud upon the Act, and their action not taken in good faith.(1)

When an offence has been committed, the Police authorities may investigate it, in which case they must comply with the provisions of law with regard to investigation; they may feel that the detention of the accused is more essential in the interests of the State and that what he is likely to do is more important than what he has already done, in which case it would be open to them to detain him under the Security Act. But they cannot pursue both courses at the same time. They cannot detain a person under the Security Act and at the same time carry on investigation against him, without providing him with the safeguards to which he is entitled under the law.

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(1) Vimlabai Despande v. Emperor, A.I.R.1945 Nag.8.

The powers of the detaining authority under the Security Act are very wide. The detaining authority may detain a person, even though the grounds clearly disclose that he could have been prosecuted under the ordinary criminal law with regard to those very grounds. The detaining authority may detain a person, although a Criminal Court has acquitted him in respect of the very charge for which he is being detained under the Security Act.

If however extraneous circumstances influence the making of the order, the order can never be said to have been made bona fide. Even if the detaining authority was satisfied, still in the eye of law it is an order which was made for a collateral purpose; it is made mala fide, and it cannot be sustained in a Court of Law.(1)

In Jagdish's case(2), it was pointed out that it was impossible to construe Rule 129 of the Defence of India Rules as justifying the police, in effect taking a person, already in their custody under the Criminal Procedure Code, out of that custody and placing him in detention under the Defence of India Rules, for the purpose of investigating the very crime, for which he was originally apprehended. It was held

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(1) Maledath v. The Commr. of Police, A.I.R.1950 Bomb.202.

(2) Emperor v. Jagdish, A.I.R.1946 All.249.

that Rule 129 could not be invoked in the case of a person who, whatever he may have done, was no longer even at liberty, but had already been taken into custody under the provisions of the Criminal Procedure Code. The same principle was reiterated by the Lahore High Court in another case.(1) If the police use their powers of detention under Rule 129, not for any purpose connected with the Defence of India or the efficient prosecution of the war, but merely to enable them to investigate a crime under the Penal Code more easily and possibly more efficiently, it is a misuse of the powers given by the rule and the High Court is competent to release the detenu under Section 491 Criminal Procedure Code, in spite of Section 16 of Defence of India Act. An order of detention for investigation of an offence already committed was held not to be valid and could be questioned in the Courts, in spite of Section 16.(2)

In Narayanamma's case,(3) it was held by the Hyderabad High Court that, if the main purpose of detention be investigation of a crime, detention of a person under the

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(1) Bisheshwar Dayal v. Emperor, A.I.R. 1946 Lah.36

(2) Dilbhag Singh v. Emperor, A.I.R. 1944 Lah.373

(3) Narayanamma v. Hyderabad, A.I.R.1950 Hyd.68.

Preventive Detention Act would be colourable, improper and amount to circumventing important provisions of the Constitution, and as such it cannot be allowed.

Where the detaining authority makes up his mind to detain a person, who is alleged to have committed an offence, the detaining authority has made his choice and it would not be permissible to investigate the offence, while the person is under detention and the provisions of the law with regard to investigation are ignored. If the purpose of detaining a person is collateral, i.e. to deprive him of his rights and safeguards under the Criminal Procedure Code and to carry on an investigation without the supervision of the Court, then the detention is mala fide and cannot be justified.(1)

Where it is clear from the averments in the affidavit filed by the detaining authority, that the object of a detention order was to prevent the release on bail of the detenu, who was charged under certain sections of the Penal Code, such an order is mala fide and where a detention is traceable to such mala fide exercise of power alone, the detention must be held to be illegal.(2)

Where an under-trial prisoner is ordered to be released on bail and soon after is detained under the

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(1) Maledath v. Commr. of Police, A.I.R.1950 Bomb.202

(2) In the matter of N.K.Sreenivasan, A.I.R.1949 Mad.761.

provisions of the U.P. Maintenance of Public Order (Temporary) Act, 1947, the detention cannot in all cases be held to be mala fide. Every case depends upon its merits. The Court, when granting bail under the provisions of the Criminal Procedure Code and the executive authorities when ordering detention under the Maintenance of Public Order (Temporary) Act, act in different spheres, guided by different considerations and actuated by different objectives. The Courts are charged with the judicial determination of an offence already committed and in that connection to consider whether or not to grant bail to the accused. The detaining authority on the other hand, while acting under the Public Order Act, has before him the object of taking preventive action in the interest of the maintenance of public order and safety and communal harmony. Their fields of activities are not concurrent. They are largely exclusive of each other. The overlapping arises only incidentally, when considering the past conduct of that person. It may be that the Court, on a consideration of the relevant matters and in the light of the provisions in the Criminal Procedure Code, may consider the grant of bail proper, whereas the Provincial Government or the District Magistrate, acting under the U.P. Maintenance of Public Order (Temporary) Act 1947, may consider his detention

necessary in the interest of public order, safety and communal harmony. In such a case the order of detention cannot be said to be mala fide. But where it appears that the detention order was passed to defeat the order of the Court granting bail and not for purposes mentioned in the U.P. Maintenance of Public Order (Temporary) Act, 1947, it is mala fide.(1) Where the order of detention was passed by the District Magistrate long before the release of the detenus on bail was thought of, but he thought that, as the detenus were already in jail, it was unnecessary to give immediate effect to the orders of detention and when the detenus were released in pursuance of the order of the High Court granting bail, the District Magistrate, in the interest of public peace, enforced the order of detention, the District Magistrate must be held to have acted bona fide.(2) But where the applicant was in judicial custody at the time when the order of detention was passed, that exercise of power was held to be not in good faith.(3)

Where the order of detention is communicated to

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(1) Mohd Hasan Khan v. Rex, A.I.R. 1949 All. 406.

(2) In re K. Rajogopalrao, (1949) 2 M.L.J.614

(3) In the matter of Sreenivasan, A.I.R.1949 Mad.761

Government long before the detenu is actually arrested, it is impossible to attribute mala fides to the authority concerned by reason of the delay in communication.(1)

The validity of an order of detention after acquittal on trial of a criminal charge came up for consideration with reference to the Bombay Public Security Measures Act, 1947, in the case of Hiraji Shivram v. Commissioner of Police.(2) Their Lordship held :-

"The act does not contemplate that there should first be a prosecution for the purpose of securing conviction and then, when after that long drawn out process was over, the Police Commissioner should have recourse to the special powers, and arrest the person concerned on these very grounds, which, in the first instance, should have been made the ground of detention. It is not for the Police to usurp the function of the Magistrate to keep the detenu in custody when the magistrate has granted bail to the detenu and thus to arrogate the right to review the judgment of the Magistrate."

In the instant case Desai, J. observed ,

"I do feel and feel strongly, that it is not

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(1) Venkataraman v. Commissioner of Police, A.I.R.1949 Mad.605

(2) A.I.R. 1948 Bomb.417.

permissible for the Commissioner of Police to lend himself to any course of action, which suggests that he arrogates to himself the right to review the judgment of the Magistrate. He must respectfully abide by it. When then a situation arises, which lends itself to the construction that the action of the Police Commissioner is an attempt to supersede the order of the Magistrate, Courts of Justice must be vigilant to see that justice is not brought into ridicule and rendered impotent and that a tendency towards autocracy does not prevail in the minds of the representatives of the democracy."

In another case it was observed,(1) that "Where a man is arrested and brought up before a Court on some definite and specific charge, it seems to me very undesirable and indeed quite wrong for an order of detention to be made against him before he has been tried on the charge and his guilt or innocence finally determined. If he is convicted or sentenced, the necessity of any order of detention ceases to exist, at least until he has served out his sentence, by which time conditions may have entirely altered. If on the other hand, he is acquitted, and an order of detention is sought against him, surely, the official on whom the responsibility of making such an order

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(1) Kamla Kant v. Emperor, A.I.R. 1944 Pat.354, 365.

rests, should obtain and study a copy of the judgment. I do not say that, in no case where a man has been acquitted, should or can an order of detention be made. Prosecutions may break down, and acts of the person against whom an order is sought other than the act or acts, which led to his being prosecuted, may quite properly have to be taken into consideration. Clearly however in most of such cases, the act which led to a man's prosecution will also be the overt act relied on or principally relied on to connect him with some subversive movement and justify the making of an order of detention and if the official, on whom the duty of making the order is cast neglects to send a copy of the judgment, it may very well be said that he has failed to act with due care and attention in the discharge of that duty."

In Emperor v. G.K. Yagli,(1) Lokur, J, observed:-

"It is a fallacy to say that the right to prosecute a person under the ordinary criminal law and the right to detain him under the Defence Rules or the Ordinance are mutually exclusive. If a person, who is really dangerous to public safety and maintenance of public order, commits an offence, Government would certainly be justified to prosecute him for the offence first, and if, for want of

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(1) (1945) 47 Bom. L.R.669.

sufficient evidence, the prosecution fails, it would none the less be necessary to keep him in detention for the sake of public safety and maintenance of public order. If the argument be accepted, it would be risky for Government to prosecute such a man, lest the power of detention would be lost in case of his discharge or acquittal. The standard of evidence required for conviction is different from that required for a reasonable satisfaction of the necessity for detention in the interest of public safety or maintenance of public order. For conviction the Court has to be convinced of the guilt of the accused and the benefit of a reasonable doubt goes to the accused. But for the purpose of detention, it is enough if the Government or any officer duly empowered is reasonably satisfied of the necessity of his detention and there can be no benefit of doubt, since the public safety and maintenance of public order are the paramount concern of Government during these times of emergency. Hence even if the evidence adduced at the trial is not sufficient to secure his conviction, the power of the Provincial Government to order his detention is not lost, if it is reasonably satisfied that it is necessary to do so with a view to prevent him from acting in any manner prejudicial to the public safety or the maintenance of public order."

A plea of mala fides cannot succeed on mere vague allegations. There should be specific allegations of mala fides.(1) Where a person has been arrested and is under Police custody with a view to investigation into a crime and his prosecution for the same, but subsequently Government decides to drop the said proceedings and to detain him under the Preventive Detention Act, the fact that, while in police custody, he was interrogated does not necessarily prove that the subsequent detention order was for a collateral purpose or mala fide.(2)

The mere fact that the detention order followed the release of the detenu on bail in a criminal case is not sufficient to hold such order to be mala fide. In Miraj Mohd's case(3), the detenu was already in Jail in connection with a separate criminal case. On the date he was to be released on bail by order of the High Court, the detenu was served with a detention order under Section 3 of the West Pakistan Maintenance of Public Order Ordinance, 1960. It was urged that, since the detention order followed the release of the detenu on bail, the order was mala fide. It was held that it was not possible on this single circumstance alone to

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(1) Iftikhar-ud-Din v. Sarfraz, P.L.D.1961 S.C.585

(2) Maqdoom Mohi-ud-Din v. State, A.I.R.1952 Hyd.112.

(3) Miraj Mohd v. Govt. of West Pakistan, P.L.D.1966 Kar.283.

hold that the order was mala fide. Possibly the detention order was made to deprive the detenu of the liberty restored to him by the bail order of the High Court, but it is equally possible that the detaining authority had an honest conviction that the petitioner was not a person to be allowed free movement and action in the context of the situation then prevailing, without detriment to the maintenance of "law and order." In the absence of any proof that the action of the detaining authority is motivated by malicious intent and purpose, which the petitioner must prove as a fact, we are unable to attribute any malice to the detaining authority.

Preventive justice in all cases must proceed to a certain extent upon suspicion or anticipation, as distinct from proof. For passing an order of detention, it is the satisfaction of the magistrate which is necessary. If the authority has sufficient material to satisfy himself, he can act even though there is no detailed evidence of the type on which a court of law can convict an accused. The fact that the police were unable to furnish a detailed report till a date very near the one on which the order was passed cannot lead to the inference that the order was passed mala fide in the absence of materials.(1)

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(1) Mohit Lal v. The State, A.I.R. 1951 Pat. 439

Instances of past activities are relevant to be considered in giving rise to the subjective mental conviction of the detaining authority that the persons to be detained are likely to indulge in objectionable activities. Though the object of preventive detention is to prevent a person from acting in future in an objectionable way, the Court cannot hold that the order of detention is mala fide because it refers to past activities, for, the satisfaction of the detaining authority is subjective.(1) It is also legitimate to consider activities outside the jurisdiction of the authority making the order of detention,(2) but the past activities must be related to the situation existing at the moment when the detaining authority makes the order. If the detaining authority, on proper material, is satisfied that such relations exist, it will be difficult for the court to hold the detention illegal.(3)

The order of detention is not mala fide, merely because

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(1) Bhim Sen v. The State of Punjab, A.I.R.1951 S.C.481

(2) Sarju v. State, A.I.R.1956 All 589 (593).

(3) Mahbub Anam v. Govt.of East Pakistan, P.L.D.1959 Dacca 774.

a person, on the expiry of his detention under a temporary law of preventive detention, has been detained on the same ground, under another Act.(1)

Recourse to preventive detention, where the ordinary law would be sufficient to meet the needs of the case, may lend colour to the conclusion that the order is mala fide. It cannot be stated as a rule of law that, when a person is accused of an offence, the only course open to the authorities is to prosecute him and that he cannot be detained. It is a fallacy to say that the right to prosecute a person under the ordinary criminal law and the right to detain him are mutually exclusive. There is no rule of law that, unless a choice of one of two alternatives, prosecution or detention, is made at the earliest moment, the order of detention must be held to be invalid. The proper approach is to consider the facts of each case and then consider whether the order of detention is mala fide or not. No doubt there may be cases in which there will be a clash between the different rights, if both detention and prosecution are made and pursued at the same time. In such cases, if the State Government pursues the prosecution it must comply with the safeguards in the Criminal Procedure code, and must give the under-trial prisoner such rights as

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(1) Ananta v. State, A.I.R.1951 Orissa 27

Ram Adar v. State, A.I.R.1951 All.18

he may have under the law. It is not open to the State Government to fall back on Clause (3) of Article 22 and hold an investigation or trial in disregard of the provisions of Criminal Procedure Code. Apart however, from this difficulty, the test whether a detention order is or is not mala fide depends on whether the order is for the purpose mentioned in the order itself, namely, the maintenance of public order, or whether it is for any ulterior or collateral purpose.(1)

Cases can be imagined in which the activities of a person might be of a most dangerous type and yet there may not be enough evidence to secure a conviction or witnesses may not be forthcoming. In a case like these and others, it might not be possible to take action under the ordinary law and the detention of the person, in exercise of the powers under the Preventive Detention Act, may be considered essential. There may be other cases in which detention of the person is deemed to be more essential in the interests of the State. Whether the person should be prosecuted under the ordinary law or the Government should exercise their power under the Preventive Detention Act is a matter for the authorities to decide.(2)

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(1) Subodh Kumar v. The State, A.I.R. 1951 Pat.68

(2) Jhala Jorubha v. The State, A.I.R. 1952 Sau.12 (16).

If the authorities have recourse to the drastic measure of detention rather than to a preventive order under Section 144 of the Criminal Procedure Code, it lends some colour to the petitioner's contention that the order is mala fide but suspicion is not proof. In the absence of other facts to show that the authority was actuated by any improper or indirect motive, the order cannot be impugned as mala fide.(1)

When a man is arrested on some specific charge, it is not desirable to pass an order of detention against him before he has been tried on that charge and his guilt or innocence has been finally determined. The order of detention, in such circumstances, may result in some prejudice to the person detained, but it cannot be said that the order of detention will be illegal. When the police arrest a man under the ordinary law and when the authorities order detention under the Public Safety Ordinance, they act in different spheres, guided by different objectives and their fields of activity are not concurrent. They are largely exclusive of each other. Hence the order is not illegal. But to order detention under Public Safety Act, while a person is already under arrest under the ordinary law is, to say the

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(1) Ashutosh Lahiri v. The State of Delhi, A.I.R. 1953 S.C.451

least, undesirable, even though it may not be wanting in good faith.(1)

Where serious communal disturbances had broken out in the city the executive authorities in the discharge of their duty to maintain public order and communal harmony, thought it necessary to take preventive action against persons whom they considered to be fomentors of the trouble. They started cases against them on charges of offences alleged to have been already committed by them, as they thought it necessary, in order to prevent them from acting in a manner prejudicial to the public safety and maintenance of public order and communal harmony, to pass detention orders under the U.P. Maintenance of Public Order (Temporary) Act, 1947. They were faced with a difficult situation. Quick action had to be taken and the trouble had to be nipped in the bud. It was held that the detention orders were passed in the honest discharge of the public duty and were not mala fide.(2)

Whether an order of detention of a person can be made simultaneously with the institution of a prosecution against him does not depend on any rule of law; the question has to be approached, and answered in each case, on a consideration

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(1) Mahbub Anam v. Govt. of East Pakistan, P.L.D.1959 Dacca774

(2) Mohd Hussain v. Rex, A.I.R. 1949 All 406.

of the question whether the order of detention, in view of the pending prosecution, is bona fide or not. To answer the question, the uncontroverted facts have to be considered, and the test will be whether the order of detention is for the purpose it purports to be or really for an ulterior or collateral purpose.(1)

When there is a pending criminal case against a person but the same is withdrawn and an order of detention is made against him, the order is not necessarily mala fide.(2) The proper approach is to consider the facts of each case to determine whether the order is mala fide or not.(3)

The case of The Lahore Electric Supply Co.(4) furnishes an example of malice in fact. In this case the plaintiffs instituted a suit challenging the validity of the various acts and notices to terminate the licence of the Electric Company; then an order under Rule 75-A of Defence of India Rules (1939) was made. The subsequent order of acquisition and the seizure of the undertaking was made to defeat the plaintiff's claim, pending in Court, for the

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(1) Dayanand Modi v. State of Bihar, A.I.R.1951 Pat.47

(2) Raman Lal v. Commissioner of Police, A.I.R.1952 Cal.26,30.

(3) Ratan Lal v. D.M.Ganjam, A.I.R.1952 Orissa 52.

(4) Lahore Electric Supply Co.Ltd. v. Province of Punjab, A.I.R.1943 Lah.41 (F.B); 35 Deccan Law Reporter 153.

purpose of over-reaching the Court. It was not made bona fide; Rule 75-A did not warrant the type of order made and the order was held to be ultra vires. In relation to preventive detention cases, it would however be very difficult to establish malice in fact of the authority, for it is always a matter of subjective determination.

The onus of proving mala fides is upon the detenu(1) and the trend of recent decision shows that the burden is heavy. "It is not sufficient merely to allege that the detention is not in good faith ... Facts have got to be alleged by the detenu, sufficiently cogent to persuade the Court that, although the order, ex facie, indicates that everything that should have been done has been properly done, it is proper for the Court to call upon the Executive to justify further what is expressed to have been done in the order."(2)

It is true that an executive authority must exercise its authority honestly and without malice and it is the duty of the Courts to see that a fraudulent exercise of such power or a colourable exercise of it, to gain an ulterior

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(1) Mahbub Anam v. The Govt. of East Pakistan, P.L.D.1959 Dacca 774.

(2) Green v. Secy. of State (1942) A.C.248.

object, is stifled; but the question of the mala fide exercise of power is one of fact in each case and the onus is on the detenu to show that the order of detention is in fact a fraudulent exercise of power vested in the Government and he can sustain that burden only if he can successfully rebut the presumption of bona fides on the part of the Government.(1) The presumption of validity and adequacy of grounds attaches to the order of detention in the assumption that it is made in good faith. The mere challenge of the bona fides made by the applicant, will not, ordinarily, be enough to put the matter in issue. He must put material before the Court to lead to conclusion that good faith is lacking in relation to his detention. If a doubt is created in the mind of the Court as to the bona fides of the authorities, it is for the authorities concerned to dispel the doubt.(2)

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(1) Miraj Mohd v. Govt.of West Pakistan, P.L.D.1966 Kar.283

(2) I.L.R. (1949) 1 CUT. 244 (257).

CHAPTER VI

THE DETAINING AUTHORITY

Satisfaction

The power of preventive detention is based on the "satisfaction" of the detaining authority that it is necessary to detain a specific person because he is likely to act in a manner prejudicial to the public safety, the maintenance of public order or the security of the State. The satisfaction of the Government or other detaining authority, its nature and the right of the detenu to challenge it before the Court are questions of fundamental importance and many legal battles have been fought over the satisfaction clause contained in the various statutes and ordinances.

The satisfaction of the detaining authority may be based upon the past activities of the detenu; if such activities, in the opinion of the detaining authority, give rise to the apprehension of prejudicial conduct on his part in the future or his past objectionable activities have a relation to the existing situation.(1) The fact that the detenu has been in jail since he indulged in activities giving rise to such apprehension is itself no bar to action

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(1) Ujagar Singh v. State of Punjab A.I.R.1952 S.C.350, 352
Mahbub Anam v. Govt. of East Pakistan P.L.D.1959 Dacca 774

under preventive detention law, if the detaining authority is satisfied that, having regard to the past activities, the intended detenu is likely to indulge in prejudicial activities on his release.(1)

The satisfaction contemplated by the various acts, must be of the particular authority empowered by the law to pass the order of detention. The Secretary to the Home Department cannot thus substitute his own discretion in place of the Home Minister, whose satisfaction alone is required under the law.(2)

In Liversidge v. Anderson(3), the majority held that the Home Secretary's satisfaction was not subject to review by the court and, until recently, in India and Pakistan, this has been followed by the courts. In his dissenting judgement Lord Atkin said that the court should not act as a court of appeal in this matter but should deal with it in the same way as arrest by a police officer, empowered to arrest a person reasonably suspected of being concerned

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(1) Santhamma v. State of Hyderabad A.I.R.1951 Hyd,128.

(2) State v. Som Nath. A.I.R. 1953 Orissa 35, 37.

(3) (1942) A.C.206

in the commission of an offence; the question for determination would be whether a reasonable man, in the circumstances, would have arrested. The majority conceded that, were the statutory rule involved a piece of peace-time legislation, Lord Atkin's view would be valid but not when it was a piece of war-time legislation. In 1950 in Tinsa Maw Naing v. Commissioner of Police[1], E. Maung J., citing Liversidge, held that, as the statute involved was peace-time legislation, the court could enquire into the reasonableness of action of the detaining authority but his logic and independence brought him no immediate honour in his own country or elsewhere.

What the Law requires, it was held, is the satisfaction of the detaining authority and not of the Court. Satisfaction must be that of the detaining authority and not of the Court.

It must be an "honest" and bona fide satisfaction, not unreal, sham or mala fide. It must be a 'reasonable satisfaction' not arbitrary or irrational.[2] In a case[3] under the West Pakistan Maintenance of Public Order Ordinance, (1960, it was observed that, "It is for the

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(1) B.L.R. (1950) SC 17.

(2) Loba Ram v. State, A.I.R. 1951 Assam 43 (44)

(3) Miraj Muhammad v. Govt. of West Pakistan, P.L.D.1966 Kar.282

detaining authority to judge and put its own interpretation on the suspected prejudicial acts of an intended detenu for its own subjective satisfaction and it does not fall within the province of the Courts to probe into that satisfaction or analyse the substance and quantum of the evidence on which that satisfaction is based. In Maqdoom's case ..[1] it was held as follows:-

"Whether there is sufficient material for arriving at the conclusion that the detenu is likely to indulge in prejudicial activities is a question solely to be decided by the detaining authority. It is not necessary that such a conclusion should be arrived at on legal proof. It is well settled that the question whether the detaining authority was right, in view of the material before it, in issuing the order of detention is not justiciable. The scope of judicial enquiry in the proceeding challenging the order under the Preventive Detention is a limited one. The correctness of the statements relating to the past activities of the detenu is not justiciable. The Court cannot examine the past activities of the detenu, as alleged by the detaining authority. The reason for the exclusion from judicial scrutiny is that the satisfaction under section 3 of

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(1) Maqdoom Mohi-ud-Din v. State of Hyderabad, A.I.R.1952 Hyd. 112.

the Preventive Detention Act is subjective and no Court can substitute its opinion ..... for that of the authority and thereby hold the satisfaction to be wrongly reached. In the instant case Srinivasa Chari J. observed "The satisfaction that is expected is of the executive as it is entrusted with the duty of maintaining peace and order." This view was affirmed by the Supreme Court of India in State of Bombay v. Atma Ram,(1) where it was held that the satisfaction in such cases is to be that of Government which alone is necessary to be established.

In Abid Mirza's case,(2) it was held that the 'Satisfaction' contemplated by the Ordinance (West Pakistan Maintenance of Public Order, 1960) is the satisfaction of the authority which passes the order under Section 5. At the same time it cannot be disputed that, before such an order is passed, the authority has to apply its mind to all the material, which is relevant and to which its attention must be

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(1) A.I.R. 1951 S.C.157

(2) Abid Ali Mirza v. Govt. of West Pakistan, P.L.D.1967 Kar.408.

drawn. It must be remembered that, under Section 5 the Government has to be satisfied that, with a view to preventing the petitioner from acting in a manner prejudicial to public safety, etc., it was necessary to pass an order.

That being the requirement of law, the Government has to have all the necessary material placed before them, which it would have to examine and apply its mind to.

Reasonableness

In Ghulam Jilani's case[1] the Supreme Court of Pakistan considered the question of judicial reviewability of detention orders under the Defence of Pakistan Rules. In this case, which is of great importance, the Supreme Court (per Cornelius C.J.) held that a mere declaration of executive "satisfaction" is not sufficient to justify detention. The existence of "reasonable grounds", though not expressly required by the relevant rule, is essential. The court also held that, "It was the function of the judiciary to ascertain the existence of reasonable grounds." In arriving at this conclusion, the court found support in Article 2 of the 1962 Constitution, which requires every citizen to be treated in accordance with law and in Article 98, which the court construed as conferring power on a superior court to examine every exercise of executive power in ascertaining its lawful authority.

In 1967 the Supreme Court of Pakistan declined to

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(1) Malik Ghulam Jilani v. The Govt. of West Pakistan P.L.D. 1967 S.C.373.

follow the majority in Liversidge v. Anderson[1], applied the objective test and accepted the view of Lord Atkin, which the other Law Lords had said would be applicable to peace-time legislation. If the Supreme Court had followed the rule laid down in Liversidge's case, that would have meant recognising a rule applicable in England in grave emergencies and to apply it to legislation in Pakistan, not enacted in such a situation.

Although Lord Atkin's view was not welcomed at the time, some jurists, like Sir Carleton Allen, strongly supported his view. In an article published[2] on "Reg.18-B and Reasonable Cause," he wrote:-

"The hinge of Lord Atkin's speech is that the term 'reasonable cause' had, up to the date of this decision one clear meaning and one plain effect, in every branch of law, whether common or statutory. It involved an objective examination by an independent tribunal, of the reasonableness claimed for the conduct impugned. Lord Atkin had supported this proposition by an abundant illustration and stated categorically that there is no known exception to it."

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(1) 1942 A.C.206

(2) Law Quarterly Review 1942 (58) P.232

Further on it has been said, "...when the Regulation requires the Minister merely to be satisfied," apparently it is not necessary for him to be convinced that it is reasonable to detain a subject with trial, whereas when he is required to have 'reasonable cause,' his satisfaction -- his 'mental state' must be accompanied by an element of reasonableness. Sir Carleton believed that objective test should have been used by the House of Lords in this case and in conclusion wrote :-

"The spectacle of dispassionate justice and of calm adherence to the law of land, even in the force of imminent danger, will always be more admired ... than immunity of executive action on any grounds of temporary urgency; and it will be particularly admired at a time when the nation is embattled against no enemy more sinister than the odious doctrine that the administration of justice is subservient to the requirements of 'Policy.' "

Ghulam Jilani's case came on appeal before the Supreme Court against the decisions of the High Court of West Pakistan on challenging a petition for habeas corpus the detention, under the Defence of Pakistan Rules, of three persons namely, Malik Ghulam Jilani, Sardar Shaukat Hayat Khan and Nawabzada Nasrullah Khan, who were leading politicians.

A brief history of the events, which led to the making of the detention orders against them may be stated as follows:-

On the 11th January 1966 the Tashkent Declaration was announced in Lahore. It had been signed at about midnight on the previous night. The Declaration aroused feelings of strong resentment among certain sections of the people, not only in Lahore, but elsewhere in West Pakistan as well. On the 12th January posters appeared in Lahore, announcing a procession of protest on the following day. On the 13th January, a procession of students was taken out, despite the fact that an order under section 144, Criminal Procedure Code, was in force in Lahore, prohibiting the assembly of five or more persons. Violence followed and there was extensive damage to public and private property. Another procession was taken out on the 16th January and, on the 18th January, there was a similar procession which was, it seems, sponsored by the combined opposition parties.

All these processions were taken out in defiance of the order under section 144, Criminal Procedure Code. On the 28th January an announcement was made after the Friday prayers outside Wazir Khan Mosque in Lahore City, consisting of a "heartfelt appeal" by named representatives of the four parties, including Malik Ghulam Jilani, to their supporters that "in their efforts for restoration of basic rights,

they should not endanger their personal liberty and defy the order under section 144, Criminal Procedure Code, until after the Conference called for the 5th/6th February by the combined opposition parties had announced its decisions."

On the 5th February 1966, the Conference was duly held in Gulberg, the three detenus being among those present. In the Welcome Address, the speaker applauded the sacrifices of the troops and civil population, as well as the military successes gained by the armed forces, during the September war and immediately went on to say that "a valuable victory, which we had won in the field of battle, was lost at the conference table." The reference was to the Tashkent Declaration.

This defeat had appalled and shocked the people. The speaker went on to say that, in the face of the frustration so caused, all outlets for expression of opinion were blocked by control of propaganda machinery under section 144, Criminal Procedure Code, by the arrest of speakers and by violence against students. The speech was not however concerned with the Tashkent Declaration. It went on to say that it had become necessary to change the whole political system. For this a single conference was not enough. "Constructive and lasting changes can be brought about only through a determined, organised and sustained struggle planned and launched after

real consideration," and "if this Conference can make satisfactory arrangements, it is bound to succeed."

On the following day, six resolutions were passed; one of the Resolutions condemned the Tashkent Declaration and said that, despite this Declaration, the people of Pakistan would continue to fight for the right of self-determination of the Kashmiri people and "will not make peace with India, until the State of Jammu and Kashmir has been liberated from India's forcible occupation." Following this Conference, a committee of five persons was appointed to "work for freedom and democracy."

On the 16th February 1966, the Deputy Commissioner of Lahore made a detention order under rule 32 of the Defence of Pakistan Rules which had been made in exercise of the power in section 3 of the Defence of Pakistan Ordinance; that order is the subject for consideration in the present case. The order said that the Deputy Commissioner had considered "the report of the Police and all the attending circumstances, namely, the recent disturbances in the Province of West Pakistan and particularly in the city of Lahore, culminating in the commission of violence against the police personnel and the public tranquillity and necessitating the closure of schools and colleges." On such consideration, he was

satisfied that there was enough material to show that the three detenus concerned in this case, along with two other persons" are or have been jointly engaged in activities which are likely to seriously prejudice the maintenance of public order and peaceful conditions in the city of Lahore and elsewhere in the Province. "In order to prevent them from acting in the aforesaid manner, it was necessary that they should be arrested and detained.

During the course of the hearing of these appeals, all the three detenus were released by the Provincial Government. In the ordinary course, such release would have had the effect of causing the appeals to abate, but in these cases, learned counsel urged that, since, in each case, the detention had exceeded a period of nine months, the detenus had thereby incurred disqualification in respect of their right to stand for elections to representative offices, by the effect of section 53 of Electoral College Act and section 106 of the National and Provincial Assemblies (Election) Act. Each of them was a politician of standing and was gravely prejudiced by this result in respect of his future political career and each of them was therefore interested to have it declared that his detention was illegal. The Court was therefore asked to record a decision as to the legality of the detention order of the 16th February, 1966.

Cornelius, C.J: said, "the number of rules made under the Defence of Pakistan Ordinance is 208. Of these, it appears to us, as at present advised, that only two rules, viz: Nos. 32 and 204 are relateable by subject to the power afforded by section 3 (2)(x). Rule 32, so far as it is relevant to the present discussion, is reproduced below:-

32. (1) The Central Government, if satisfied with respect to any particular person, that, with a view to preventing him from acting in a manner prejudicial to the security, the public safety or interest or the defence of Pakistan, the maintenance of public order, Pakistan's relations with any other power, the maintenance of peaceful conditions in any part of Pakistan, the maintenance of essential supplies and services or the efficient conduct of military operations or prosecution of war, it is necessary so to do, may make an order:-

(b) directing that he be detained."

Rule 204 is worded as follows in its relevant part:-

"204.(1) Any police officer, or any other officer of Government empowered in this behalf by general or special order of the Central Government, may arrest without warrant any person whom he reasonably suspects of having acted, of acting, or of being about to act -

(a) with intent to assist any State at war with or engaged

in military operation against Pakistan, or in a manner prejudicial to the security, the public safety or interest, or the defence of Pakistan or to the efficient conduct of military operations or prosecution of war. A point of initial importance is that section 3(2)(x) makes suspicion of at least one of a number of specified activities a necessary condition for action to apprehend or detain. Rule 204 follows, in respect of persons with certain injurious intentions, the very words of section 3(2)(x), viz:- "suspects, on grounds appearing to such authority to be reasonable, of having acted, acting, being about to act" in a prejudicial manner. The power of a police or other empowered officer given by Rule 204 is dependent upon suspicion, based on reasonable grounds that the person in question has performed or is performing or is about to perform a prejudicial act. One may ask whether, if the officer believes on reasonable grounds that the person in question has acted or is acting or is about to act in prejudicial manner, he is debarred from exercising this power under Rule 204, when his state of mind, in the relevant respects, is appreciably more definite than if he were acting on mere suspicion. Can it be supposed that he could not exercise the power of arrest conferred upon him by Rule 204, if he in fact knew, not necessarily by

direct observation, but on the basis of evidence which he could reasonably accept, that the person had committed, was committing or was about to commit a prejudicial act? And what would be the position, if he had this knowledge by direct observation? Would his power under Rule 204 be defeated, because his state of mind was formed from direct knowledge or inferential conviction or reasonable belief, each of which as a ground for action, is immeasurably stronger than mere reasonable suspicion? There can be no doubt that Rule 204 must be construed and applied so that, if the ground for action be stronger than mere suspicion, the power afforded by that rule would certainly be available. In perhaps a more pertinent aspect, the extent of protection that the public servant can claim for his actions, it is even more clear that a state of direct knowledge, or inferential conviction, or reasonable belief, would be at least as complete a justification as reasonable suspicion.

A similar construction may be placed in my view upon the words "suspect on grounds appearing to such authority to be reasonable," that have been employed in section 3(2)(x) of the Ordinance. Even under these words, rules may therefore be made which enable action to be taken on grounds of direct knowledge, inferential conviction, or reasonable belief. It is in that light that Rule 32 falls to be construed. Its

wording follows a provision in clause (x) enabling the making of rules for the detention of persons "with respect to whom (such) authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner", e.g; in a manner prejudicial to the maintenance of public order. This rule requires a stronger ground for action than mere suspicion, however reasonable. For the making of an order of detention of any person, it is necessary that the detaining authority should be satisfied in relation to such person, that it is necessary to make such an order for the purpose of preventing him from acting in a prejudicial manner e.g; acting so as to disturb the public order. There must be in the mind of the detaining authority a belief that the person in question is either about to act or is likely to act in the aforesaid manner; only so can the word "satisfied" be construed. Preventive action is called for only by imminent and real necessity, under this rule. Such satisfaction, as has been said above, would be within the power of the rule making authority to prescribe under section 3(2)(x) of the Ordinance, even under the earlier words, viz; "suspects, on the grounds appearing to such authority to be reasonable" of being about to act to the prejudice of public order. But if "satisfaction" may, for securing protection to empowered

authorities, be deemed to be included within the meaning of "suspicion," the other condition must also be deemed to apply viz; the requirement of reasonable grounds for satisfaction. Is it admissible to differentiate between protection for action on suspicion and action on satisfaction, both understood as analysed above, so that in the one case reasonable grounds must be established to give protection and in the other a mere declaration is sufficient? Clause (x) does not differentiate between the authorities which may be empowered to act,with the incident of protection on suspicion and those which may act, under similar protection, on satisfaction. The element of status in the empowered authority does not appear from any words used in the clause, though it is present in Rules 32 and 204. Yet by virtue of subsections (4) and (5) of section 3, the delegation of power under any rule may be made to any officer of the Central or a Provincial Government and under Rule 204, the same power that a police-constable has may be conferred upon any other officer, by general or special order of the Central Government, which may delegate this power of making orders to a Provincial Government.

Reading clause (x) according to the tenor of its language, and bearing in mind that it makes legal provision for restraint upon personal liberty, which is a fundamental

right of a citizen in Pakistan, the conclusion that appears unavoidable is that, to gain protection for any action thereunder, the existence of reasonable grounds is essential and a mere declaration of satisfaction is not sufficient."

"The ascertainment of reasonable grounds is essentially a judicial or at least a quasi-judicial function. It is too late in the day to rely, ... on the dictum in the English case of Liversidge,(1) for the purpose of investing the detaining authority with complete power to be the judge of its own satisfaction. Public power is now exercised in Pakistan under the Constitution of 1962, of which Article 2 requires that every citizen shall be dealt with strictly in accordance with law. If then Rule 32 owes its vires to section 3(2)(x), it must follow that, by the use of the words "reasonable grounds," clause (x) has unmistakably imported into this rule, controlling the exercise of public power, the requirement that, to gain protection of the rule for its action thereunder, the authority should be prepared to satisfy the Courts, to which the subject is entitled to have resort, for determination of the question whether he has been treated in accordance with law, that it has acted on reasonable grounds."

His Lordship, referring to the Article 98 of the Constitution of 1962 further observed, "Power is expressly

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(1) 1942 A.C.206

given by Article 98 to the Superior Court to probe into the exercise of public power by executive authorities, how high soever, to determine whether they have acted with lawful authority. The judicial power is reduced to a nullity if laws are so worded or interpreted that the executive authorities may make what statutory rules they please thereunder and may use this freedom to make themselves the final Judges of their own "satisfaction" for imposing restraints on the enjoyment of the fundamental rights of citizens. Article 2 of the Constitution could be deprived of all its content through this process and the Courts would cease to be guardians of the nation's liberties.

The Supreme Court of Pakistan reaffirmed the rule laid down in Ghulam Jilani's case in two later cases.(1) After the decision of Ghulam Jilani's case, Clause (x) of the sub section (20) of section (3) of the Defence of Pakistan Ordinance, 1965 was amended by Ord. No.2 of 1968, with the specific object of providing that the High Court should not examine either the sufficiency or the reasonableness of the grounds of detention under the said ordinance. It was held that, in this view of the matter, the amendment to clause (x) of section 3(2) of Defence of Pakistan Ordinance "Has been an exercise in futility" and has in no way affected the

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(1) Abdul Baqi Baluch v.Govt.of Pakistan,P.L.D.1968 S.C.313
Govt.of West Pakistan v.Begum Agha Shorish Kashmari,
P.L.D.1969 S.C.14

reason given by this court in Ghulam Jilani's case.(1)

The Supreme Court of India has laid down that 'satisfaction' of the executive authority, under section 3 of the Preventive Detention Act, 1950, as to the necessity for making an order of detention against any person, is not subject to judicial review, and the question as to the propriety of the order of detention is not justiciable. The reasoning of the Supreme Court is, that, "a law providing for preventive detention lays down the principles governing the scheme of detention and the grounds on which an order of detention could validly be based; such a law is perfectly constitutional and cannot be challenged as an unauthorised delegation of legislative power to the executive, if it leaves it to the satisfaction of the executive authority to decide in each case, as it arises, whether one or the other of such grounds exists in that case, and whether the detention of the person concerned is necessary with a view to prevent his future prejudicial activities. It follows that the Court cannot place itself in the seat of the detaining authority and that the satisfaction of that authority cannot be challenged in a Court of Law."

Action for preventive detention has, of necessity, to be taken only on well founded suspicion as to future activities.

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(1) Govt. of West Pakistan v. Begum Agha Shorish Kashmari, P.L.D.1969 S.C.14

Preventive detention is not a punishment for some specific act or omission, but is only restraint imposed on a person to prevent him in future from acting to the detriment of the State. The test for the order of detention is necessarily subjective and is based on the cumulative effect of different actions spread over a considerable period. A Court of law is the least appropriate tribunal to investigate the question whether circumstances warranting the restraint do or do not exist. The purpose of detention is not to prevent a specific act but to prevent the achievement of a detrimental object and all the action which may lead to that object could never be anticipated.

Therefore, objective standards of conduct, which the Court can utilise for determining whether in a particular case the requirements of law have been complied with, cannot be laid down in a law providing for preventive detention, and the satisfaction of the executive authority cannot be subject to judicial examination.(1)

In a later case (2) the Supreme Court of India reiterated its earlier view that a detention order, being within the subjective satisfaction of the executive, could not be judically scrutinised and could not be challenged on constitutional grounds.

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(1) Gopalan A.K. v. State of Madras A.I.R.1950 S.C.27.
(2) Sadanan Dan v.State of Kerala, A.I.R.1967 S.C.1170

Proof of the factum of satisfaction of detaining authority is a condition precedent for valid exercise of power under Rule 32. But an order of detention passed on fictitious and colourable satisfaction and without care or circumspection commensurate with gravity of cases affecting the liberty of citizens, cannot be sustained.(1)

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(1) Abul A'la Mudoodi v. Govt. of West Pakistan, P.L.D.1964 S.C.673

Hussain Ali Changla v. District Magistrate, P.L.D.1966 Lahore (309).

Communication of Grounds

Fundamental Right No.2 Cl.(5) says:-

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order. Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest todisclose.

The term "as soon as may be" means "as soon as feasible" in the circumstances of each case. If the grounds are not communicated to a detenu as soon as may be, there would be infringement of his Fundamental Right, guaranteed by the Constitution and his detention would become illegal. In an Indian case (1) the phrase was explained as follows:- "This (expression) allows the authorities reasonable time to formulate the grounds on the materials in their possession. The time element is necessarily left indeterminate, because activities of individuals tending to bring about a certain result may be spread over a long or short period, a larger or a smaller area, or may be in connection with a few or

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(1) State of Bombay v. Atmaram, A.I.R.1951 S.C.157.

numerous individuals. The time required to formulate the proper grounds of detention, on information received, is bound to vary in individual cases."

In Pakistan, Kayani, C.J.[1] gave different interpretations to this phrase. His Lordship observed in a case under the Constitution of 1956 "If these words " 'as soon as may be ' " have the same meaning in clause (5) as they have in clause (1), or at least as near them as may be, then a delay of sixteen days clearly violates the constitutional safeguard. The grounds, on which the detaining authority makes the order, must be known to it on the day when the order is made, and can ordinarily be served on the detenu along with the order of detention. We were referred by the learned counsel for the State to a decision of the Indian Supreme Court[2] in which a delay of sixteen days was not held to violate the Constitution 'under the circumstances of the case.' The circumstances were these. 'Under the Bengal Criminal Law Amendment Act, 1930, a very large number of persons were detained. The validity of that Act was being challenged in the High Court and the judgment was expected to be delivered towards the end of February 1950. The Preventive

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(1) Ghulam Muhammad Khan Londkhawaru v. The State, P.L.D.1957 Lah.497.

(2) Tarparda De v. State of West Bengal, A.I.R.1951 S.C.174.

Detention Act, 1950, was passed by Parliament in India in the last week of February 1950 and these orders on all these detenus (100 persons) were served on 26th February 1950. Having regard to the fact that the Provincial Government had thus suddenly to deal with a large number of cases on one day, we are unable to accept this contention. Their Lordships might have added that the detenus, having already been under detention under another enactment, the words 'as soon as may be' were robbed of practical value. The delay in the present case resulted from ordinary dilatoriness in various offices and cannot be allowed to invade a Fundamental Right."

In a case(1) under the West Pakistan Maintenance of Public Order Ordinance, 1960, it was held that, under sub-section (5) of section 5 of the Ordinance, it is rendered obligatory on the District Magistrate to communicate to the petitioner the grounds on which the order has been made and the grounds are to be communicated 'as soon as possible,' so that he may be able to make a representation. Whenever any of the directions enumerated in clause (a) to (e) in sub-section (1) of section 5 is initiated, the grounds on which the District Magistrate makes the order must be

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(1) Ghulam Ullah Khan v. District Magistrate, Campbellpur, P.L.D.1967 Pesh (195) DB.

known to him at least on the day when the order is made and can ordinarily be served on the petitioner along with the order. Cases, however, may be visualised, which would be very exceptional and rare, in which the detaining authority may not be able to serve the grounds along with the order and, in order to meet such contingency, the detaining authority is permitted to serve the grounds after the order of detention, but the grounds must be served with the least possible delay and 24 hours may be considered to be dead line, within which the grounds may be served. The period of 24 hours was fixed having regard

1) to the fact that section 5 (5) of the Ordinance is an encroachment on the fundamental rights of the citizen, which must be jealously guarded by the Courts, and

2) that the right of making a representation by the aggrieved person to the Government would be rendered illusory, if the grounds were served later than twenty-four hours.

In a more recent case in the Lahore High Court(1) the words 'as soon as may be' were interpreted as follows:-

> The words 'as soon as may be' appearing in Sub-section (5) of Section 5 of the Ordinance must be

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(1) Muhammad Aslam Malik v. Province of West Pakistan, P.L.D.1968 Lah.1324.

taken as indicating the intention of the law-maker that the grounds must be served without any avoidable delay, keeping in view the circumstances of the case. Their Lordships went on to say that the question whether this has been done is clearly a matter open to judicial review. The phrase 'as soon as may be' must, in the vast majority of cases, mean simultaneously with or soon after the order is made. If there is any delay, it must be justified to the satisfaction of the Court. And if sufficient cause is not shown for not communicating the grounds as soon as possible, then the detention order in question must be declared to be without lawful authority, on account of its failure to comply with an essential requirement of the law, under which it is issued. In the instant case there was delay of 35 days in serving the grounds of detention, allegedly on account of the pre-occupation of the officers concerned with other matters. It was held that this is hardly a satisfactory explanation, when the authorities are dealing with the liberty of the subject. In the light of these circumstances, it was held that the grounds were not furnished to the 'petitioner 'as soon as may be' after the order had been made, thus resulting in a violation of the statutory requirement contained in sub-section (5) of section 5 of the Ordinance.

But in Mahbub Anam's case[1] there was delay of two months in communicating the grounds to the detenu. The reason for the delay given by an Assistant Secretary to the Government of East Pakistan was as follows :-

"Since the Department concerned was dealing with large number of cases of similar nature and since there were large number of facts covering a considerably long period of this detenu and other persons, from which the authority concerned had to weigh and sift the relevant facts and prepare grounds for communication to the detenu, in order that he may make a representation, without however disclosing such facts as the authority concerned deems that it would be against public interest to do so, and this process took some time for preparing such grounds and as such the detenu could not be served with a copy of the grounds prior to 26th January, 1959."

Taking judicial notice of the fact that Martial Law was declared on 7th October 1958, the Dacca High Court held that the time taken by the detaining authority in furnishing grounds under the circumstances of this case was not unreasonable. But it was pointed out that Section 19 of the East Pakistan Public Safety Ordinance (LXXVII of 1958) has given a valuable right to the detenu to vindicate his innocence, if he has been wrongly detained, and hence he is

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(1) Mahbub Anam v.Govt. of East Pakistan, P.L.D.1959 Dacca 774.

entitled to know without unreasonable delay on what grounds the authority has deprived him of his liberty. Therefore, although in this particular case, having regard to the changes in the country, the delay of two months was not unreasonable, but the Court should not be understood to have laid down that in every case a delay of two months will be condoned.

While examining the quality of these rights, the Court should place itself in the position of a detenu and assume that he is the innocent victim of a misunderstanding or intrigue. If he is kept in the dark even for a single day as to the reason for his arrest, would he not feel that he was still in the dark ages?(1)

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(1) Muhammad Hashim v. State, P.L.D.1956 Kar.485

Representation:

The purpose of requiring the detenu to be furnished with the grounds and particulars is to enable him to make a representation against the order of detention and that purpose cannot be served, unless the detenu knows what exactly had moved the Government to deprive him of his liberty. The Court, therefore, can order the release of the detenu, if the grounds of detention are too vague and indefinite to enable him to make a representation.(1)

The right to grounds is of no value, if the person affected is not given a right to redress if the grounds given do not justify his detention. He may justifiably urge that the detention is wholly unjust or illegal. The representation allowed is against the order of detention, as based on the grounds furnished. His right of representation is valuable, as it is the only method available to a person detained to convince the authority that his detention is unmeritted. The right to make a representation does not involve a right to a judicial trial or a judicial enquiry by an independent tribunal. This was the view of the majority in Gopalan's case(2) but

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(1) Mahbub Anam v. Govt. of East Pakistan, P.L.D.1959 Dacca 774.

(2) A.I.R. 1950 S.C.27

Fazal Ali, J. expressed the opinion that the right to make a representation must carry with it, right to the representation being properly considered by an impartial person or persons. According to the learned judge, there must, therefore, be some machinery for properly examining the cases of detenus and determining whether they have been detained without reason.

The right to make a representation implies that the detenu should have sufficient information to enable him to make a representation.(1) The right is not confined to a physical opportunity of using paper and pen. The person detained must first have knowledge of the ground on which the authorities felt satisfied of the necessity of making the detention order. The purpose of the representation is to answer the charges contained in the grounds, so the information conveyed to the detained person must be sufficient to attain that object. While the grounds of detention are the main factors on which the subjective determination of the authority is based, other materials on which the conclusion embodied in the grounds is founded should be conveyed to the detained person to enable him to state his objections

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(1) Puran Lal v. Union of India A.I.R.1958 S.C.163

to the order. The court is entitled to examine the statement of grounds and particulars given to the accused from this point of view and to see whether the statement is sufficient to enable the detenu to make a representation. The regrettable practice of the executive furnishing insufficient details to the detenu to enable him to make a representation against his detention has been deprecated by their Lordships of the Supreme Court time and again.(1) But in Ram Singh's case(2), it was held that, when detention was ordered on the basis of certain speeches delivered by the detenu, it was enough if the date and place and the general nature and effect of the speeches, e.g. creating dissensions between Hindus and Muslims, were given. It was not necessary to point out the offending passages or give their gist.

The fact that the petitioner would suffer no hardship or prejudice by reason of sufficient particulars not having been already furnished to him is immaterial. The question is not whether the petitioner will in fact be prejudicially affected in the matter of securing his

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(1) State of Bombay v. Atmaram, A.I.R.1951 S.C.157; A.I.R.1951 S.C.270.

(2) Ram Singh v. State of Delhi, A.I.R.1951 S.C.270.

release by his representation but whether his constitutional safeguard has been infringed.(1)

The authorities must not only inform the detenu of the grounds of his detention, but also afford him the earliest opportunity of making a representation against the order. Here also the time limit is not definitely fixed. The judicial decisions seem to assume that the time for making the representation will be after the time for communicating the grounds and that during the interval the authority may supply materials and particulars, which would enable the detenu to make a proper representation.

In a case before the Indian Supreme Court(2), the particulars were supplied to the detenu after the Court had issued a rule nisi for habeas corpus to the authority, and yet the Court held that 'earliest' opportunity for making representation had been given.

There is no provision in the Constitution for the detenu to be given an oral hearing. The right to make a representation does not necessarily carry with it the right to oral representation, and a preventive detention law is

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(1) Prem Dutta v. Supdt. Central Prison, A.I.R.1954 All.315

(2) State of Bombay v. Atmaram, A.I.R. 1951 S.C.157

not rendered void because it does not provide such a right. The right to be heard orally is not an essential right of procedure, even according to the rules of natural justice.(1)

The right to make a representation does not also necessarily carry with it a right to engage a lawyer and be represented by him.(2) Such right is conceded to an arrested person under Clause (1) of Fundamental Right 2, but clause (3) makes this inapplicable to persons detained under any law providing for preventive detention.

The Constitution does not specify to whom the representation is to be made or how the representation is to be dealt with. Under section 3 of West Pakistan Maintenance of Public Order Ordinance 1960, the representation is to be made to the Government of West Pakistan; obviously when a person is detained under the East Pakistan Maintenance of Public Order Ordinance, the representation is to be made to the East Pakistan Government and in the case of the person detained under the Central Government statute, the representation is to be made to the Central Government.

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(1) Gopalan v. State of Madras, A.I.R.1950 S.C.27 para 30.

(2) ibid. para 28, 30.

Discretion to withhold facts.

Fundamental Right 2, clause (5) gives the authority making an order of the preventive detention a discretion not to disclose facts, which the authority considers to be against the public interest to disclose.

There is a constitutional obligation to disclose all grounds but not all facts. The obligation to furnish particulars and the duty to consider whether the disclosure of any fact involved therein is against the public interest are imposed on the detaining authority.(1)

The present clause appears to be founded on the doctrine enunciated by Lord Maugham in Liversidge v. Anderson(2) "It is beyond dispute that he can decline to disclose information on which he has acted, on the ground that to do so would be contrary to the public interest ..... There must be a large number of cases in which the information on which the Secretary of State is likely to act will be of a very confidential nature."

Under the Constitution, the Court has no power to enquire whether it is against the public interest to

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(1) Puran Lal v. Union of India, A.I.R.1958 S.C.163.

(2) 1942 A.C.206.

disclose particular facts. Once the authority has refused to disclose any fact or facts in the 'public interest', the court has no power to declare that it was not against public interest to disclose those facts.(1) In the words of the Indian Supreme Court in the instant case "Clause 6 gives a right to the detaining authority not to disclose such facts, but from that it does not follow that what is not stated or considered to be withheld on that ground must be disclosed and if not disclosed, there is a breach of a fundamental right. A wide latitude is left to the authorities in the matter of disclosure."

The Court cannot interfere on the ground that what has been withheld should have been disclosed, but it can do so on the ground that what has been stated is insufficient to enable a representation to be made. It should not be supposed that, because this clause permits the withholding of facts which it is considered not desirable to disclose in the public interest, the authorities are bound to disclose all other facts. The sole test for determining the sufficiency of the facts is their sufficiency for giving an opportunity to make a representation.(2)

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(1) State of Bombay v. Atmaram, A.I.R. 1951 S.C.157

(2) Ibid.

"They are given a special privilege in respect of facts which are considered not desirable to be disclosed in public interest. As regard the rest, their duty is to disclose facts so as to give the detained person the earliest opportunity to make a representation against the order of detention."(1) The protection of this clause, however, is not available, unless it is stated in the communication that it is not in the public interest to give the particulars which are withheld.(2)
Although this discretionary power of the Government has been upheld by the Courts, the misuse of this power has been a subject of criticism.

In Inayat Ullah Khan Mashriqi's case(3) for instance, it was observed that, "Home Secretary need not have attempted to build a fortress of privilege around him by repeated reference to the instructions from his Minister and, instead of saying that the Allama was arrested with a view to prevent him from acting in a manner prejudicial to public safety, he could be more plain and disclose that

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(1) State of Bombay v. Atmaram, A.I.R.1951 S.C.157

(2) Nityananda v. Chief Secretary, A.I.R.1951 S.C.206, 238

(3) Inayat Ullah Khan Mashriqi v. Crown, P.L.D.1952 Lah.331.

Allama was arrested because Government believed that he was attempting to raise a private army, which constituted a threat to public safety and order."

It was observed earlier in the judgment that "In almost every case of detention, the detaining authority, when questioned by the Court about the reasons for detention, mechanically repeated the formula of "public safety and maintenance of public order" and displayed a positive disinclination to the matter being probed further. While such disinclination is understandable where high affairs of State are concerned, there is no reason why, in ordinary cases, as for instance where a man is arrested for defying law and order, intending to lead a banned procession, fomenting labour discontent or communal hatred or for otherwise endangering the public peace, the authority ordering the arrest should not take the Court and the public into its confidence, by giving a broad hint about the reasons for the action taken. In such cases the Court does not desire to go into details or to ask for disclosure of the material, on which the authority ordering the arrest formed its opinion, except to the extent that such information is relevant to the question whether the action taken was bona fide."

Language of Grounds

Grounds of arrest may be communicated to the detained person verbally, where the detained person is illiterate. It has been held that the illiteracy of the detenu would undoubtedly make it impracticable to communicate to him the grounds of his arrest in writing. Where such grounds were communicated orally to the persons arrested, who were illiterate, it was held that the information was duly given to them.(1)

In a case before the Supreme Court of India(2), the grounds in support of the order served on the appellant ran into fourteen typed pages and referred to his activities over a period of thirteen years, besides referring to a large number of court proceedings concerning him and other persons, who were alleged to be his associates. It was held that a mere oral explanation of a complicated order of the nature made against the appellant, without supplying him with the translation in a script and language, which he understood, would amount

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(1) Juma Khan v. The Govt. of West Pakistan, P.L.D.1957 Kar.939.

(2) Hadibandhu Das v. District Magistrate, S.C.N.1968 Page 308.

to denial of the right of having the grounds communicated and of being afforded the opportunity of making a representation against the order." In a subsequent case(1), it was held that "The grounds must be such that the petitioner may be able effectively to make a representation, submitting his explanation relating to those grounds and that necessarily implies that the grounds, when communicated in writing, must be in a language with which the detenu is familiar."

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(1) Sukesh Chandra v. State of West Bengal, S.C.N.1969 Page 60.

CHAPTER VII

JUSTIFICATION OF PREVENTIVE DETENTION

Grave Emergency

Necessity is the main justification for any legislation to exist. Whether the necessity is real or self created or self imposed may be a highly controversial issue. The Law of Preventive Detention, as it exists now, has a long history which can be traced back to the early days of British government in India. At that time, its main justification was that the British Government had to maintain law and order in the sub-continent and combat the danger of being thrown out of power by revolutionary elements. Whatever they did, so long as they remained in power, we cannot blame them, as they were foreign rulers and they had to do what was in their own best interest, with the object of preventing the upsurage of a liberation movement.

Nobody can deny that freedom of the person is the most precious of all the freedom; Preventive Detention laws are repugnant to democratic principles and they are not recognised in the Constitutions of most of the democratic countries of the World... Curiously enough this subject has found a place in the Indian and Pakistan Constitutions in the chapter on Fundamental Rights.(1)

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(1) A.K.Gopalan v. The State of Madras, 1950 S.C.J. 247

However alien to liberal thought preventive detention may be, there are very few persons who will dispute its justification during war. There may be persons against whom a judicial trial, with such convincing proof as is required in a criminal proceeding, could not be resorted to in the interest of the security of State, so their liberty has to be arbitrarily curtailed in the interest of the State.

There are ample grounds to support the theory that, when the security of the State is in conflict with the liberty of person, liberty should be taken away at the discretion of the executive in the interest of State.

Lord Atkinson said in R. v. Halliday (1) "However precious the personal liberty of the subject may be, there is something for which it may well be to some extent sacrificed by legal enactments, viz; national success in war, or escape from national plunder, or enslavement." In Ronnfeldt v. Phillips (2) it was observed by Scrutton, L.J; that

> "The Courts were always anxious to protect the liberty of the subject. In time of war there must be some modifications in the interest of the State. It had been said that a war could not be conducted on the

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(1) (1917) A.C. 260, 271.

(2) (1918) 35 T.L.R. (47)

principles of the Sermon on the Mount. It might also be said that a War could not be carried on according to the principles of Magna Carta."

In Liversidge v. Anderson (1) Lord Macmillan said, "the liberty which we so justly extol is itself the gift of law and, as Magna Carta recognizes, may by the law be forfeited or abridged. At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possess for his country's cause, it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relative mild precaution of detention."

In an Australian case (2) dealing with a Law of Preventive Detention for many purposes, including immigration, it was held by Williams J. :

"A State of War, therefore, justifies legislation by the Commonwealth Parliament in the exercise of the defence power, which makes many inroads on personal freedom. So, where the security of the country is in danger, there is justification for interference with the liberty of

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(1) 1942 A.C. 206 Page 257

(2) Adelaide Co: of Jehovah's witnesses v. Commonwealth. 1943 67 C.L.R. Page 116.

individuals in ways which would not be acceptable in peace time. Individuals may profess ideas or carry on activities, which in time of peace may be harmless, but which in time of war may interfere with the successful defence of Commonwealth."

"It is recognized that the internment of such persons on mere suspicion without trial for some period not exceeding that of the war upon the opinion of a Minister that their liberty is prejudicial to the safety of the realm, is a valid exercise of a plenary administrative discretion."

In an American case (1) it was observed that, "In every war, there are men previously of good character, wicked enough to counsel their fellow citizens to resist the measure deemed necessary by a good government, to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large."

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(1) Ex parte Milligan, (1866) 4 WALL 2.

THE SITUATION IN PAKISTAN

Now the question arises, after we achieved Independence, what justification was there to retain such preventive legislation. The answer to the question is not very simple; one has to look to the initial difficulties with which we were faced. At that time the liberty of the person was not at stake but the survival of the newly born State was the main object of the fathers of the nation. The analysis of the initial problems which are outlined below themselves justify the necessity for such measures. When Pakistan came into existence as an independent State, the confident expectation of our enemies and many neutral observers was that the administration in Pakistan would break down in a few months. But it was proved false by the efficiency, fortitude and devotion to duty of those in the services of Pakistan. The whole nation was imbued with a sense of mission to make Pakistan a going concern; and Government servants, at that time as a class, were deeply infused with this national spirit. They worked long hours and put up with hardships of all kinds. There was no thought of self but only of how to serve the nation in order to strengthen and consolidate Pakistan. The whole administration worked as one team. Every Government servant from highest to lowest, placed all the resources of his knowledge and all the energy of his body and mind unreservedly

at the service of Pakistan. Those who participated in the great task of establishing Pakistan were privileged beyond all later generations in sharing a unique experience.

The East Wing of Pakistan was faced with a number of serious problems. It had to establish a new Capital at Dacca and to set up a new administration. There was a shortage of personnel to run the administration. The majority of officials were Hindus and they opted for West Bengal. Over 50 per cent of the Civil and Criminal Courts could not function, owing to the shortage of judicial and executive officers. The number of Muslims from Bengal in the Superior Services of Government was negligible. The economic life of the Province was affected by the partial withdrawal of Hindu businessmen, who held a monopoly of commerce and banking and, for a time, there was almost a total stoppage of consumer goods from West Bengal.

The mass influx of Muslim refugees from East Punjab, Delhi and neighbouring States, on a scale unparalled in Europe even in its worst hours, created problems of such vast proportions and complexity, that even a fully organised and well established administration could not have coped with. Quaid-E-Azam and the Central Government had to devote much time and energy to these problems and to the even more serious Kashmir dispute, that erupted soon after partition.

In North West Frontier Province, Dr. Khan Sahib's Congress Ministry was still in office on 15th August, 1947.

Quaid-E-Asam wanted the loyal co-operation of all citizens, regardless of political differences in the past, for the task of building up Pakistan. No one was to be victimized for having opposed the establishment of Pakistan. In keeping with this policy, Dr. Khan Sahib and his Ministers would have been allowed to continue in office, but they refused to salute the Pakistan flag and showed no sign of a change in their previous attitude of opposition to Pakistan. Therefore on 22nd August, 1947, the Governor dismissed Dr. Khan Sahib's Ministry on Quaid-E-Azam Orders and Khan Abdul Qayyum became Chief Minister.

The secret deal (1) between Lord Mountbatten and Congress for advancing the date for the transfer of power from 1st June 1948 to 14th August, 1947 was deliberately intended by the Congress party to deny Pakistan time to organize an administration and to establish itself on a sound basis. As a result of these happenings, the Provincial Government of Punjab was unable to reorganize itself properly. There was the greatest mass migration in history. Within a matter of weeks millions of people had left their homes and gone forth on foot, by bullock-cart, by railway, by car and by 'plane to seek shelter and safety in the newly-born State. For the

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(1) Chaudhari Muhammad Ali, The Emergence of Pakistan, P.254

existing administration the task of feeding, clothing, settling and rehabilitating these millions was impossibly difficult. The violent upheavals that had taken place had shattered the economy, strained a yet hardly formed administration beyond breaking point and disrupted communications. Pakistan is unique in being composed of two equally important parts separated by a thousand miles of foreign territory. The physical characteristics of the two regions are very different. The problem of communication was of outstanding importance. East and West are separated by 1,200 miles by air and 3,000 miles by sea. The over-riding necessity of the time was to get the administration going. Some officers had to be transferred to the East Wing, to meet the deficiency of the staff there. Anti-social elements had publicised the idea of provincialism to such an extent that Quaid-E-Azam had to make appeal for national consolidation. In a public speech in Dacca on 21st March, 1948, Quaid-E-Azam said (1) :-

> "Let me warn you in the clearest terms of the danger that still faces Pakistan and your province in particular, as I have done already. Having failed to prevent the establishment of Pakistan, thwarted and frustrated by

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(1) Quaid-E-Azam Muhammad Ali Jinnah, speeches as Governor General of Pakistan, Pakistan Publication, Karachi, 1963. Page 58.

> their failure, the enemies of Pakistan have now turned their attention to disrupt the State by creating a split amongst the Muslims of Pakistan. These attempts have taken the shape principally of encouraging provincialism. As long as you do not throw off this poison in our body politic, you will never be able to weed yourself, mould yourself, galvanise yourself into a real true nation .... Islam has taught this and I think you will agree with me that, whatever else you may be and whatever you are, you are a Muslim. You belong to a nation now, you have now carved out a territory, vast territory; it is all yours; it does not belong to a Punjabi, or Sindhi, or a Pathan, or a Bengali; it is yours. You have got your Central Government, where several units are represented. Therefore, if you want to build up yourself into a Nation, for GOD's sake give up provincialism."

Our leaders were given a country; not only were they inexperienced but they were given a country in which chaos could easily have prevailed. The sub-continent had been partitioned and they were asked to realign the economy of the country, which, up till then, had been based on India, as it then was, regarded as a single and compact economic unit; the communication system of the country, railways, roads, telegraphs, which had their centres at strategic spots, had to be changed,

the centres relocated and lines running to and from them gathered up and relaid. A strong communication system had to be established between East and West Wing.

Under these circumstances, when the whole nation was trying to strengthen, consolidate and build up Pakistan on a firm footing, there were anti-social elements bent on violence and the overthrow of law and order, by striking at vital necessities of government, like railways, telegraph, post offices and the destruction of private as well as public property. In certain parts of the country the conditions were worse than could be guessed. The newly formed independent government decided, therefore, that it could not afford to take risks and that a period of stability was essential, if the country was to settle down. That is why the law of preventive detention was retained on our legal books, as the government could not afford the time and risks of going through the elaborate legal process of prosecuting suspected persons.

Even after a long time, when we have overcome the initial difficulties and problems, the internal conditions are not so good as to justify the repeal of this kind of preventive legislation. On the contrary conditions necessitate it to be the permanent feature of the Constitution. The conditions in the Republic require such a law to put down unlawful and subversive activities of certain groups of persons whose

actions appeared to be against the security of State and the maintenance of public Order.

Prof: Alan Gledhill, defending the existence of preventive law during the British Raj and putting forward a justification for the continuance of such laws in India (which is of course applicable to Pakistan as well, with the exception that the majority of Pakistani leaders did not taste the hardship of preventive detention as did the Indian leaders) wrote (1) "the Indian Founding father, some of whom had been subjected to preventive detention, if they had followed the voice of their hearts, might have abolished it as an attribute of British Imperialism, but their conduct was dictated by their heads. They were well aware of the various provincial laws authorising preventive detention and, including clause 4(ART.22) in the Constitution, they obviously intended to preserve the efficiency of those laws, while affording some protection against their abuse. Lawyers may dislike it, as repugnant to their notions of the rule of law; democratic politicians may inveigh against it, but the Constituent Assembly retained it with good reasons, as a necessary instrument for ensuring the peace and good Government of India at the time when the Constitution came into force and in the foreseeable future."

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(1) Life and Liberty in Republican India. Journal of the Indian Law Institute Vol.2., P.253.

L.C.B. Gower in his book [1] justified the existence of such measures in African countries; he said that many of these countries have resorted to preventive detention, a development that has caused concern and understandably so. But it was, surely, too much to hope for anything else. The British, after all, did not succeed in ruling most of these Countries without preventive detention and the new rulers do not feel themselves likely to be more successful. One sometimes feels that they exaggerate their insecurity and that, as in the early days of Ghana, it was repression that led to disaffection rather than disaffection which led to and justified repression. But disaffection there certainly has been, plots everywhere, mutinies in Kenya, Uganda and Tanganyika; successful coups d'etat in Zanzibar, Nigeria, Ghana, Sierra Leone and (arguably) Uganda. The situation in surrounding territories has been even worse: successful coups d'etat in Togo, Dahome, Congo Brazzaville, the Central African Republic, Upper Volta, Gabon, Burundi and the Sudan: Civil War in Congo-Kinshasa; sabotage in the Cameroons; genocide in Ruanda; and assassination (of two Prime Ministers) in Burundi [2]. In these circumstances it is hardly surprising

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(1) Independent Africa, the Challenge to the Legal Profession Pages 85-87.

(2) This incomplete catalogue makes Africa sound terribly dangerous: yet when one is there it seems more friendly and less dangerous than Central Park or Boston Common (L.C.B. Gower).

that the Governments have protected themselves with the shield that the colonialist taught them to use. The threat from anti-social elements within a nation sufficiently strong to disrupt the life of the country and jeopardize the existence of the prevailing form of Government is a problem of apparently accelerating importance. The activity of such groups may stem from various causes. The most common, particularly in Pakistan perhaps, is disloyalty to the existing Government, often accompanied by the desire to effect change by violent means. Another cause may be strong dis-satisfaction with certain Government policies and a demand for a separate State within the federation. Also the presence of powerful lawless elements, with perhaps no political motive, but for various reasons beyond the scope of the ordinary machinery of the law, may give rise to these problems. In these circumstances the only weapon which comes to the rescue of the Government in maintaining law and order is preventive detention. In Rose v. King [1] there is a reference to this presumption, "The strict, rigid and necessary rule that the State, first and foremost, owes to its own Citizens, independently of its foreign duties, to ensure its own security and to repress crime, which its own nationals might commit against the King and against the security of the country."

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(1) 1946, 88 C.C.C. 144 at 144 (Canadian case).

The justification of the imposition of preventive detention by the ruling party is based on the assertion that conditions are threatening but to demonstrate that they are threatening is difficult. There are certain facts and figures within the possession of the Government, which would justify the necessity of such legislation, but which the Government officials say cannot be made public. As Dr. Katju said, (1) "... we must take a realistic attitude about this matter and while, owing to a variety of circumstances, the situation has improved, there are still very many black clouds on the horizon and very many danger signals to be seen. I am not in a position, and it would not be a proper time for me to say, what sort of information is received from time to time, almost every week, by Government and we cannot be complacent about it ..... We know the philosophies, the ideologies, the different passions and emotions which are prevailing over large groups of people..."

The Government has presumably initiated preventive detention legislation on information not available to the general public but which was entirely persuasive of its necessity.

The executive has usually admitted that preventive detention is not an unmixed blessing. Preventive detention is an unfortunate derogation from the principles of democracy and the rule of law.

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(1) Lok Sabha Debates August 1, 1952, Col.5001.

The Government of the day may fail to justify its existence by producing facts and figures. The ruling party in Pakistan has failed to specify the circumstances which necessitate recourse to this sort of law, so it may be argued that it has no real reasons. The Government can only say in defence that, if the number of detenues increases, such law is needed and if the number falls, the Government argues that the law is doing its job. To make a clear cut case is really difficult for the Government of the day. One member of the Constituent Assembly of India justified these measures in the following words:- (1)

> "Those who occupy seats of authority and responsibility .. .... warn us that the aftermath of war and partition has unchained forces which, if allowed to gain (the) upper hand, will engulf the country in anarchy and ruin. They therefore advocate that Parliament must be able to pass laws, arming the executive with adequate powers to check these forces of violence, anarchy and disorder. They are great patriots and our trusted leaders ..... the difficulty is this, that, even if we were to stand for our own convictions, there is no scope for experimenting in such matters. There is a saying in Marathi that whether a thing is a poison or not cannot be tested by swallowing it;

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(1) Constituent Assembly Debates, Sept.16, 1949. Page 1554 (India).

because if it is poison the man dies. So in such matters there is no scope for experiment and we have therefore to heed to the warning given by our leaders."

There is no infallible test of when such legislation is needed nor is there any indication that it will be abandoned voluntarily in the near future. The experience of the United Kingdom and the U.S.A. may give valuable guidance to Pakistan and India. In both these Countries the availability of the power of preventive detention has been made contingent upon the existence of extreme emergencies like war. In ordinary circumstances, if a sudden emergency arises, Government may act in panic and haste. Moreover, a threat, which in the West would be regarded as a sudden emergency, is in our country a condition of every day life. Democracy in our country needs to be guarded more carefully than in the West, where the countries have a long history of established democratic principles.

After all our Constitution does not order preventive detention; it simply lays down certain rules which must be followed, if there is resort to such detention. It follows that the people and their representatives can abandon such legislation or amend the Constitution, if they think it will be beneficial to the country as a whole. The opposition may claim that the power to legislate for preventive detention is

also used to suppress opposition for the party in power but a study of legislation on this subject will show that it is not directed against a particular ideology or political party but against those who make it impossible for Government to function normally. It may be a provocateur, political agitator, black marketeers, communist or any other person of dangerous character. The liberty of the vast majority is threatened by a small group of persons which is sufficiently active to justify the curtailment of their liberty. The justification for such legislation can be found in the actions of those people, who deliberately engage in fomenting violence and agitation. A relatively small number of provocateurs can create a large amount of unrest, protest and outright violence. The policy of preventive detention is directed against actions and not against the individuals or political parties. Pandit Nehru's (1) justification was that it was directed primarily against activity which was communal, communist, purely terrorist and jagirdari. The Government, he said, has a fundamental responsibility to maintain order and to staunch the provocative influence of a few, which is directed to the exploitation of narrow prejudices of various groups. There is no democracy or liberty in a society where order is lacking.

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(1) Lok Sabha Debate, August 2, 1952. Col. 5192.

It may be argued that such measures are used by the party in power to suppress the opposition but the fact is that it is used for eliminating communal activities, harbouring of dacoit and goondaism, which are threats to peace and order and security of the state. There may be cases where political opponents have been detained on charges of goondaism or violence. It may be said that in such cases the executive acted mala fide (1). The Government no doubt in some cases may have acted mala fide but this is difficult to prove in the Courts, unless there is first hand evidence of improper motivation. If it is proved that the Government's action was motivated by ulterior purposes, the Court, apart from setting free the detenu, has also deprecated the Government's action.

There are commonly accepted limits to the manner in which protest can be expressed. Since the establishment of Pakistan, many agitations have been led by semi-political or religious personalities, which have been marked by long processions which were violent, by strikes, by picketing of public offices, and burning of public and private property. In our country there is a lack of understanding about when and how to agree. If it is asked who is responsible for these out-breaks of violence, the answer from the opposition may be that Government adopts policies not acceptable to the masses.

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(1) See cases in the previous chapter.

Government would say it is the political agitators, who, for their own selfish ends, instigate the people to protest against everything which, after due care and consideration, it decided to adopt. Government cannot make a scientific laboratory, where its policies can be tested and results published before legislation is introduced in the House. It is only after a lapse of time that it can be proved that a particular Government in those particular circumstances was justified in adopting a particular policy or attitude towards its problems. A member of the opposition in India once said (1) that the Prime Minister had warned again and again that the days of street demonstration and the like were over. But as long as his Government and its officers did not act justly and fairly, there would be demonstrations and things like that. After all, why should a lover of freedom and democracy get so upset? Are these not the usual processes of democracy?

The right of revolution may not be incompatable with democratic government. Democratic theory has always insisted that government was to be limited in its encroachment on individual rights and freedoms. Peoples have a moral right to demonstrate, even by violent means, against an oppressive government. The question is where the line between oppressive and non-oppressive government is to be drawn. Government may be oppressive for some people, when it touches the question of

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(1) Reported in the Times of India (Bombay) Sept.3, 1955. Page 5 (J.P.Narayan).

national language or when it proposes to modify property rights or abolish the dowry system or change the law of marriage, or to reform the religious laws and so on; for others each of these is a matter on which the Government must take some initiative. The result is demonstrations for and against the Government reforms. The threat to peace remains, so long as political parties or small bodies of people claim the right to agitate for their demands by organized defiance of law. So long as such thinking prevails, there will always be a justification for preventive legislation in order to maintain law and order.

It is essential for economical and social progress to maintain the rule of law. Social stability is a sign of national advancement and ensures meaningful individual freedom. The instrument for carrying out the wishes of the people for the amelioration of their lot is a democratically elected Government. This instrument must be responsible to the people as a whole, not just to one or another set of special interests. Within the limitations of a freely adopted Constitution, the Government must see to it that the social progress of the mass is not frustrated by the narrow prejudices of a few. To secure this end, it is often necessary to restrain the anarchical freedom of some individuals, in order to ensure to a greater number, the fulfilment of other forms of freedom. Regulatory action of this type may be called arbitrary

repression, which in a genuine way it is, but no Society ever became orderly without an element of restriction. Those who try to compare our country with the United Kingdom, where there is no such legislation in peace time, should keep in mind the social and economic differences between the two countries. Apart from the recent students' demonstration against the Vietnam War (1968-69), one rarely hears in the United Kingdom of demonstrations against Government policy and even these recent demonstrations, with few exceptions, were not violent but peaceful. The fact is that the people of United Kingdom seem to have a greater respect for the law than our people. In such circumstances there can hardly be any justification for such law during peace time. In our country preventive detention may be justified by the fact that the people generally do not appreciate the advantages of democracy. Our Government must deal more severely with malefactors, because the example of successful defiance of law is more injurious to the development of a democratic political culture, than it would be in the West. Organized defiance of law by a minority, against the wishes of the majority, often leads to anarchy. When the Government in under-developed countries is trying to establish democracy on firm footing and give the country social, political and economic stability but is faced with coercive public protest, the only instrument which can protect the Government is the

law of preventive detention. The main advantage of preventive detention is that a person may be removed from a troubled scene quickly; surely the authorities should not be obliged to wait for judicial approval or tolerate the release of a defendant upon a bail pending trial. Preventive detention is a Heaven-sent opportunity to the opposition for criticism of and attack on the ruling Government, but it is evident that no nation can fight a War or survive the kind of extraordinary emergency with which our country is threatened every day, without having a power like this in reserve. Once this is conceded, it is better to face the facts, concede such power and impose reasonable restraint on the ambit of its exercise. Nobody has ever denied that detention without trial is prima facie a denial of justice but when some element in the country or a political party tries to attain power by unconstitutional or violent means, disrupting peace and public order and creating political and economic chaos, it is the innocent man who suffers. To save the masses from injury preventive detention is justified. It is necessary to meet the communist menace and to control the growth of undisciplined movements and parties, which are disturbing factors in our Country. The evidence in possession of the authorities may not be sufficient to support a judicial conviction of crime but it should be sufficient to convince a reasonable man that a detenu is likely to indulge in activities which are dangerous

to public peace and order. If the executive is obliged to go through the lengthy process of collecting evidence to support a judicial conviction, it may or may not succeed but the person concerned may succeed in his object. The object of the preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing so. The Government has often been criticized on the ground that the object of preventive detention is not what they say it is, that it misuses it for its own benefit, so that the ruling party may retain the critics of their policy behind bars. In other words it is used by the Government mainly for political purposes and abuse of the power cannot be denied, but the Courts are able to help those who are innocent victims of the Government.

If we look at other fundamental rights, it will be clear that most of the rights can be reasonably restricted in the public interest or in the interest of morality, public order, security of Pakistan, friendly relations with foreign States, decency or in relation to contempt of Court. These limitations on fundamental rights are recognised in most of the democratic Countries of the World. On the same principle, liberty of the person may be restricted in the interest of public order and security of the State.

Why are persons detained under the Law of Preventive Detention? The answer to the question is not simply that

they can't be tried under any other law. Preventive detention is provided for people who indulge in extraordinary activities calculated to encourage violence and public disorder, to produce evidence of which is difficult and takes a long time, but if left at liberty would be dangerous to the maintenance of peace, order and security of state.

Prof. Alan Gledhill [1] points out in a nutshell that "Preventive Detention is an administrative necessity and likely to cause less human misery than might result from likely alternative measures to deal with persons who cannot be successfully prosecuted for their activities, though they are a menace to public security and order."

ALTERNATIVE REMEDIES

Now we have to see what other remedies are available and whether they can achieve the object which the Government has in view.

There are certain provisions in the Criminal Procedure Code, the object of which is the prevention and not the punishment of the offences. These provisions are for persons who are a danger to public, by reason of the commission by them of certain offences. Magistrates are supposed to exercise this preventive jurisdiction with watchful care and see that the administration of this branch of law does not become harsh and oppressive. These provisions of the Criminal Procedure Code are reproduced here below with some comments; we shall consider whether these sections serve the purpose which the Government has in view when promulgating Preventive Detention Laws.

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(1) Fundamental Rights in India. 1955 P.126.

Section 106 of the Code of Criminal Procedure provides:-

(1) Whenever any person accused of any offence punishable under Chapter VII of Pakistan Penal Code, other than an offence punishable under Section 143, Section 149, Section 153 A or Section 154 thereof, or of assault or other offences involving a breach of the peace or of abetting the same or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace.

Such Court may, at the time of passing the sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it think fit to fix.

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

There are some serious limitations before a person can be ordered to execute a bond for keeping the peace :

(i) He must be convicted of one of the offences enumerated.

(ii) The bond can only be ordered in addition to sentence and not in lieu of sentence.

(iii) On appeal, if the conviction is set aside, the bond is void.

It was not contemplated that an order to furnish security under the Section would be coupled with a non-appealable sentence. It should rarely if ever be necessary to do this and should certainly not be done, until it has been ascertained that the accused is able to furnish security [1]. An Appellate Court can cancel an order to furnish security passed by the original Court while upholding the sentence [2].

Section 107 of the Code of Criminal Procedure provides :-

(1) Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity, the Magistrate, if in his opinion there is sufficient ground for proceeding, may, in manner provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

(2) Proceeding shall not be taken under this Section

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(1) Emp. v. Nga Tun, A.I.R. 1935 (13) Rang. 363

(2) Abdul Waheed v. Amiran Bibbi (30) I.L.R. 1903 Cal. 101.

unless either the person informed against or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate other than a ..... District Magistrate, unless both the person informed against and place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction.

(3) - - -

(4) - - -

The section is preventive and not penal; it is not intended for the punishment of past offences but for prevention of acts that may amount to or lead to a breach of peace thereafter. Action under this Section can be taken only when "in the opinion of the Magistrate there is sufficient ground for proceeding". Thus, in each case, the Magistrate has to exercise his discretion with reference to the credibility and sufficiency of the information received by him (1). The information must show that there is a strong and reasonable probability of a breach of the peace and not merely a bare possibility (2). If he comes to the conclusion that the apprehension as to breach of the peace is unfounded

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(1) Asghar Khan v. State, A.I.R. 1964 All.391

(2) Malik v. Bano, P.L.R. 1903, 115.

he need not take any action under this Section [1]. The information regarding the past acts alone would not be enough to justify an order requiring a person to furnish security for keeping the peace. Something more is necessary, viz: the likelihood of the commission in the near future of a particular breach of the peace or wrongful act, likely to lead to a breach of peace [2]. A Magistrate can only proceed under this Section, if both the place where the breach of the peace or disturbance of public tranquillity is apprehended and the person proceeded against are within the local limits of his jurisdiction. This is a limitation on the power of the Magistrate; if the person leaves the jurisdiction, no action can be taken against him.

Section 108 (I) of the Code of Criminal Procedure provides:

Whenever .. a District Magistrate, or a Magistrate of the First Class, specially empowered by the Provincial Government in this behalf, has information that there is, within the limit of his jurisdiction, any person who, within or without such limit, either orally or in writing, or in any other manner, intentionally disseminates, or attempts to disseminate, or in any wise abets the dissemination of :

(a) any seditious matter, that is to say, any matter

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(1) Shamas-ud-Din v. Ram Dayal, A.I.R. 1924 Lah.630

(2) In re Rangaswami, A.I.R. (30) 1943 Mad. 394.

the publication of which is punishable under Section 123 A or Section 124 of the Pakistan Penal Code; or

(b) any matter the publication of which is punishable under Section 153A of the Pakistan Penal Code; or

(c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Pakistan Penal Code.

Such Magistrate, if in his opinion there is sufficient ground for proceeding may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

The implication of this section is that, in order that a person may be bound over under this section, it must be shown that the person concerned is in the habit of intentionally disseminating or attempting to disseminate any such matter as is referred to in section(1). For this purpose it is necessary to show that the person proceeded against was connected with the dissemination of the matter in question. The mere writing of the matter disseminated or authorship

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(1) Jagan Nath v. Emperor, A.I.R. 1932 Lah.7

thereof is not sufficient to bring a person under this section(1). So under this section strict legal evidence of judicial standard is required before a person can be ordered to furnish a security for good behaviour. No proceeding under this section can be taken against the editor, proprietor, printer or publisher, except with by the order or under the authority of Provincial Government or some officer empowered by the Provincial Government in this behalf.

The section requires that the person should be within local jurisdiction of the Magistrate. This means the moment a person leaves the jurisdiction and goes to settle in another District, no proceedings can be taken against him.

Section 109 of the Code of Criminal Procedure provides :-

Whenever a District Magistrate, Sub Divisional Magistrate or Magistrate of the First Class receives information :-

(a) that any person is taking precaution to conceal his presence within the local limits of such Magistrate's jurisdiction, and there is reason to believe that such person is taking such precaution with a view to committing any offence ;

(b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself, such Magistrate may, in manner hereinafter

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(1) Emperor v. T.K.Pitre A.I.R. 1923 Bomb.255

provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period not exceeding one year as the Magistrate thinks fit.

The section deals with proceeding against persons, who in English Law would be classed as rogues and vagabonds.

The first part of clause (b) refers to ordinary beggars and vagrants but the latter parts deal with cases of persons who cannot give a satisfactory account of themselves. The object of the section is to frustrate the criminal designs of such persons before they are carried out (1).

Section 110 of the Code of Criminal Procedure provides :

Whenever a District Magistrate, or Sub-Divisional Magistrate or a Magistrate of First Class, specially empowered in this behalf by the Provincial Government, receives information that any person within the local limits of his jurisdiction :-

(a) is by habit, a house breaker, thief or forger ; or

(b) by habit a receiver of stolen property, knowing the same to have been stolen; or

(c) habitually protects or harbours thieves or aids, in concealment or disposal of stolen property; or

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(1) Emperor v. Phuchai A.I.R.1929 All.33

(d) habitually commits or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief or any offence punishable under Chapter XII of Pakistan Penal Code or under Section 489-A, Section 489-B, Section 489-C or Section 489-D of that Code; or

(e) habitually commits or attempts to commit or abets the commission of offences involving a breach of peace; or

(f) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding three years, as the Magistrate thinks fit to fix.

The object of the section is to afford protection to the public against a repetition of crimes in which the safety of property is menaced as well as those in which the security of the person is jeopardised. Again the object of the section is the prevention and not the punishment of offences and, with that object, it authorises the Magistrate to take good and sufficient security for good behaviour and with much

discretion by the Magistrate and only in those cases where the evidence is very clear and precise[1]

Section 144 of the Code of Criminal Procedure - empowers Magistrates to issue orders absolute and at once in urgent cases of nuisance or apprehended danger.

(I) In cases where, in the opinion of a District Magistrate, Sub-Divisional Magistrate, or of any other Magistrate, not being a Magistrate of the third Class, specially empowered by the Provincial Government or the District Magistrate to act under this section, there is sufficient ground for proceeding under the section and immediate prevention or speedy remedy is desirable,

Such Magistrate may by a written order, stating the material facts of the case and served in manner provided by section 134 direct any person to abstain from a certain act or take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

(2) An order under this section may in cases of emergency or in cases where the circumstances do not admit

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(1) Rajendra v. Emperor, 1912 (17) C.W.N. 238

of the serving in due time of a notice upon the person against whom the order is directed, be passed, exparte.

(3) Any orders under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section by himself or any Magistrate subordinate to him or by his predecessor in office.

(5) When such an application is received, the Magistrate shall afford to the applicant an early opportunity of appearing before him either in person or by a pleader and showing cause against the order; and if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.

(6) No order under this section shall remain in force for more than two months from the making thereof, unless, in cases of danger to human life, health or safety or a likelihood of a riot, or an affray, the Provincial Government, by notification in the official Gazette, otherwise directs. The orders under this section are judicial and not administrative [1].

The section provides for temporary orders being passed in urgent cases of nuisance or apprehended danger. Two

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(1) Belvi, A.I.R. 1931 Bom. 325, 326.

conditions are necessary to be satisfied before a Magistrate can act under this section.

(a) The Magistrate must be satisfied that immediate prevention or speedy remedy is necessary. It is in fact, the urgency of the case that vests the Magistrate with jurisdiction to exercise the powers conferred by this section(1). A mere statement that he considers the case to be urgent is not sufficient, if the facts show that in reality, there is no urgent necessity for action(2).

(b) The Magistrate must be satisfied that the direction to abstain from a certain act or to take certain order with property is likely to prevent or tends to prevent obstruction etc; as specified in the section(3).

There is another limitation on the use of this power under this section; the powers conferred by this section are discretionary and should be used sparingly and only where all the conditions prescribed are strictly fulfilled(4). Action under this section is taken by the District Magistrate in

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(1) P.T.Chandra v. Emperor, A.I.R. (29) 1942 Lah.171

(2) Chandra Nath v. Emperor, A.I.R.1919 Cal. 584

(3) Sri Raj Narain v. D.M. A.I.R.1956 All.481

(4) P.T.Chandra v. Emperor, A.I.R. (29) 1942 Lah.171

cases of apprehended danger. It is therefore unreasonable to expect that, in the circumstances of a case, the District Magistrate should act in closest and full consultation with the Government, which is responsible for the maintenance of public order(1). The duration of the order must be co-extensive with the emergency; it should not be wider than is necessary to prevent the emergency. The Magistrate cannot issue an order intending to have effect for all time.

A person disobeying an order under this section is liable to be punished under S.188 of Pakistan Penal Code. The prosecution in such cases has to be launched under the provisions of S.195 or S.476 of the Code(2).

In short, this portion of the Code reproduced above applies to five classes of persons.

(i) Persons, upon conviction, who have committed or abetted offences against the public tranquillity with certain exceptions, or of assault or other offences involving a breach of the peace.

(ii) Persons who are likely to commit a breach of the peace or disturb the public tranquillity, or do

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(1) Gul Hussain v. Crown, P.L.D. 1956 F.C. 190
P.L.R. 1956 Lah. 1351
1955 F.C.R. 81 (Cornelius, J.)

(2) In re Veerappa Moopan, A.I.R. 1939 Mad.496

any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity.

(iii) Persons who disseminate seditious matter.

(iv) Vagrants and suspected persons.

(v) Habitual offenders.

These categories of the persons may be asked to execute a bond with or without sureties and the bond executed by these persons will be forfeited upon failure to maintain good behaviour or upon engaging in the kind of activity for which they become suspect.

There are certain serious limitations upon the effectiveness of these sections in preventing the social unrest. In the first place jurisdiction is limited to the District Magistrate or Sub Divisional Magistrate or Magistrate of the first class.

This means that no other Magistrate can take the action if he has a suspect in his area. Again, as there is a question of jurisdiction, a man against whom an order has been passed in one district can go to another district and continue his activities there. Secondly, Magistrates may arrest and detain these persons, only if they cannot furnish the bond specified. Thus a wealthy person with means, a political agitator, provocateur, who constitute the greatest threat and whom the Executive is most anxious to lock up, are

precisely those who can execute the needed bond. These people will always have the money available to avoid detention under these provisions and it will be the poor who will be the victim under these sections.

Under section 144 of Criminal Procedure Code the power is uncomprehensive and, for that reason, is very often used. The section imposes a penalty upon an individual or group for acting in a particular way. It does not ensure, as detention would, that the proscribed behaviour will not take place. Many determined individuals would undoubtedly find a maximum imprisonment of six months and a fine, a small price to pay for creating disturbances by taking part in a riot or inciting ordinary citizen to act in the defiance of section 144. This section has lost much of its force, because too many people at one time can join in an agitation against the Government and it is difficult to arrest all of them. There is no disgrace attached to going to jail for disobedience of an order under section 144. The judicial authorities in many areas seem to be fully aware of this, for whether as cause or effect, they impose inadequate fines or no fine at all for transgressing orders prohibiting the assembly of five or more persons. Although the section could not be applied as a deterrent usually it is applied in this way. However, even if it were applied in the most stringent way, it would not completely eliminate the threat to law and order. Some people take

pleasure in defying the orders under this section and in many cases voluntarily join a mob which is prepared to defy the orders under this section. In some cases[1] the people who defied an order under section 144 of Criminal Procedure Code were never even brought before the Court, but were taken several miles from the place of arrest by the police and left there to find their way home by walking during the darkness of night. If this is done, section 144 cannot be relied on as an effective deterrent. It can also be argued that this section cannot be relied upon to prevent violence and riot on a large scale in any situation where stability is balanced against chaos. There are cases of political agitators, determined to disturb the peace and order of a locality, in which section 144 may fail to prevent this threat to peace and order but if these persons were detained under preventive detention laws, the threat to peace and order could be avoided.

The Code of Criminal Procedure also makes provision for preventive action by the law enforcement authorities in relation to certain classes of offences. The police are enjoined to prevent the commission of any cognizable offence (section 149 of Criminal Procedure Code). A schedule of cognizable offence is given in the second schedule to the

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(1) See Ghulam Jilani case. P.L.D. 1967 S.C.373

Code of Criminal Procedure. Cognizable offences are the more serious offences, likely to cause public alarm and, for that reason,a police officer may arrest without a warrant any person designing to commit such an offence. Furthermore, police officers have the duty of preventing injury to public property (section 152 of Criminal Procedure Code). Whether these preventive powers of the police are adequate for stifling the kind of endemic unrest and instability, with which the executive is faced depends in part on what offences are listed as cognizable.

The Pakistan Penal Code defines the criminal offences and the punishments involved. The offences which are relevant for our purpose are "offences against the public tranquillity" (sections 141 - 160 of the Pakistan Penal Code). These sections deal with unlawful assembly, rioting, rioting with deadly weapon, assaulting public servants, giving provocation to riot, promoting enmity between classes, hiring persons to take part in unlawful assemblies, riot and affray. All the offences mentioned in sections 141 to 160 are cognizable, with the exception of sections 153/A, 154, 155, 156 and 160, so a police officer may arrest persons without warrant in order to prevent the commission of these offences other than those last enumerated, but unless it is possible to secure a conviction, the person goes free; The action taken by the police to prevent cognizable offences under the provision of

these sections will only temporarily check the activities of a particular person, unless a case can be made out with sufficient evidence to secure punishment in a Court. This means the action under these sections is always punitive, which is neither the aim of executive nor the object of preventive detention, which is to prevent a person from doing anything which will be prejudicial to the public peace and maintenance of public order. The provisions of the Pakistan Criminal Law intend to prevent breaches of the public peace, do not deal with the kinds of offences the executive is anxious to prevent and they contemplate investigation and trial, according to the established principle of jurisprudence. The Preventive Detention laws are valuable because the detention can be secured without judicial proof of an offence committed. The Pakistan Criminal Law does not allow a suspected provocateur to be removed from the scene of his activities whereas, under the Preventive detention laws such person can be detained. Moreover the offences under Pakistan Penal Code are bailable, whereas a person preventively detained cannot be released on bail. If it is necessary in the interest of public peace a possible provocateur or trouble-maker may be removed from the scene and the ordinary criminal law of the land is certainly inadequate. The criminal codes are founded upon the principle that a man is innocent until proved guilty. The law is designed to

ascertain the facts and to assess them. The law of Preventive Detention is free from such legal technicalities and a man can be detained in the interest of security. There are many cases in which effectiveness of action is more important than certainty of judgment. As we have seen that the Pakistan Penal Code and Criminal Procedure Code are insufficient to meet the needs which the executive has in mind for the peaceful and stable running of the Government and to maintain peace and order in the country. Again as in a Criminal Court the accused can always be represented by a pleader; witnesses are examined and cross-examined and strict rules of evidence are followed, with the result that a well-to-do mischief-maker always has a chance of being set free to disrupt peace and order, by acquiring the services of a good lawyer. The Court can only proceed, on formal charges, to determine the guilt or innocence of the accused on the particular charge it punishes; it does not prevent. The Courts are too weak and inadequate to cope with a situation where the authority of Government and its stability are being challenged. When law and order breaks down, it is the innocent who suffer. How far the powers under the Criminal Procedure Code can enable the police to maintain peace and order in a locality can be seen from the report in a newspaper(1), that about 2,000 shopkeepers of Brandreth Road,

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(1) The Pakistan Times dated 10.1.1970

Circular Road, Bull Roads, Chowk Dalgram and Iron Market observed complete strike to protest against the criminal activities of a gang of bad characters in the area. The police say they are powerless; the powers given to them to deal with this type of person are inadequate. They cannot obtain concrete evidence, which would lead to a conviction. On the other hand, if the executive will enforce preventive detention, they need not produce legal proof of an offense but only have to satisfy an authority that by detaining a person, peace and order can be restored in the locality.

We have now seen that the various provisions in the Criminal Procedure Code and Pakistan Penal Code are insufficient to do the job, which a good Government should have in mind. It can now be said that the justification for the laws of detention without trial in a constitutional democracy is that the ordinary criminal laws with their historic safeguards, designed to produce a fair trial before conviction, are inadequate and cannot be made adequate to meet the recurring emergencies, with which the Pakistan Government is faced.

EMERGENCY POWERS

The Constitution of the Islamic Republic of Pakistan 1956 in Article 191 and the Constitution of 1962 in Article 30 empower the President to declare by Proclamation that a grave emergency exists in the Country, by reason of which the security or economic life of Pakistan or part thereof is in imminent danger of being threatened by war or external aggression or by internal disturbances, which is beyond the power of the Provincial Government to control. While a Proclamation of Emergency is in force, laws and executive acts contravening the fundamental rights to freedom of movement, assembly, speech, the rights to deal with property and to follow an avocation are valid until the Proclamation is revoked. The President may further declare that the right to move a court for the protection of any fundamental right is suspended while the Proclamation remains in force. Such a declaration would probably affect the protection against arrest and detention. It would however still be possible to impugn a detention order, for non-compliance with the law under which it was made, for mala fides or for unreasonableness. One may ask whether the Criminal Procedure Code and the Pakistan Penal Code are not adequate; can't the President proceed under the powers conferred upon him by the Constitution to restore peace and order in the interest of the State? The answer may be that the object

of the framers of the Constitution is that these powers should be used in extreme emergency and not when the peace and order of a locality is in danger. The justification of the law of preventive detention is that, while the emergency powers of the Constitution cannot be used often, the power under the law of preventive detention can be used as frequently as is desired. The law of preventive detention can be used to meet minor troubles, which may lead to the emergencies contemplated by the Constitution; the law of preventive detention is a check on circumstances which may give rise to a grave emergency.

The law of preventive detention is aimed at those who cannot be dealt with under the ordinary law of the land. The liberty of some individuals may be curtailed, so that they may not make a nuisance of themselves to the others. Absolute and uncontrolled liberty would lead to anarchy and disorder. The enjoyment of personal liberty must be subjected to reasonable restriction in the interest of peace, order and stability of the State. There should be a proper balance between the right of the individual and the power of the State to restrict it in the interest of the State and not for the benefit of those who have, for the time being, been elected to run the Government. The use of these preventive powers is aimed at a class of people who, though a danger to the State, are generally regarded as in a different class from these against whom the sanctions of

law of crimes are directed. They are the people against whom prompt action is necessary, if it is to be effective. The State cannot run the risk of encouraging immunity of such persons either by failure to bring them to trial or unsuccessful prosecutions. It is better perhaps that this class of person should be subjected to preventive detention than that he should be arrested on specific charges, ill treated to extort confessions, tried on evidence and convicted by a judge.

The main problem of our Country is the existence of so many political parties with political leaders of various ideologies, and extreme views about the modes of protest and agitation. As long as this is the problem and there is no agreement between the leaders, there will always be a justification for the laws of preventive detention.

CHAPTER VIII

CONSTITUTIONAL REMEDIES FOR LOSS OF LIBERTY.

The Writ Procedure

A right without remedy for enforcing it is of little value. A mere declaration of fundamental rights would be a formality, if there were no effective means of enforcing it. Keeping this in view our constitution contains provisions by which these fundamental rights can be enforced. The Constitution of 1962 has conferred power on the High Courts to issue direction or orders or writs, in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of Fundamental Rights.

"The writ jurisdiction," declared Kayani, C.J. "brings to a benighted morality the light that never was on sea or land. God is in His Heaven and all's right with the world - God was in His Heaven even before the writ jurisdiction, but all wasn't right with the world. Consequently, if you are spiritually inclined, you say the writ jurisdiction is the modern manifestation of God's pleasure and God's pleasure

dwells in the High Court."(1) Referring to the analogous provisions in the Indian Constitution Dr. Ambedkar said,(2) "If I was asked to name the particular Article in the Constitution as the most important, without which this Constitution would be a nullity, I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it."

The Constitution of Islamic Republic of 1956, by virtue of Articles 22 and 170, empowered the Supreme Court and High Courts to issue directions, orders and writs, including certiorari, prohibition, mandamus, quo warranto and habeas corpus. This Constitution was abrogated on 7th October 1958 and the country was placed under Martial law but, even at that time, under Article 2 (4) of the Laws (Continuance in Force) Order of 10th October 1958, the Supreme Court and the High Courts still retained power to issue the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, though the Fundamental Rights were abrogated.

The Constitution of 1962, Article 2, declares that every citizen, wherever he may be, and every other person for the time being in Pakistan, has the inalienable right to enjoy

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(1) Kayani 'Not The Whole Truth' P.44

(2) C. A. Debates Vol.VII P. 953.

the protection of the law and to be treated in accordance with law; no action detrimental to the life, liberty, body, reputation or property of any person shall be taken, except in accordance with law, no person shall be prevented from or be hindered in doing what is not prohibited by law and no person shall be compelled to do that which the law does not require him to do. When this right is infringed by a private individual, the person aggrieved must seek the appropriate remedy provided by the ordinary law. But when it is infringed by an official or public authority, a remedy may be sought in a High Court by a writ petition.(1)

Article 98 which empowers the High Courts to issue orders (not writs) for specific purposes, generally in the nature of mandamus, habeas corpus, certiorari, prohibition and quo warranto, reads as follows.

Article 98

Jurisdiction of High Courts

1) A High Court shall have such jurisdiction as is conferred on it by this Constitution or by law.

2) Subject to this Constitution, a High Court of a Province may, if it is satisfied that no other adequate remedy is provided by law -

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(1) Alan Gledhill, 'Pakistan, the Development of its Law & Constitution' (1967) P. 179.

(a) on the application of any aggrieved party make an order -

(i) directing a person performing in the Province functions in connection with the affairs of the Centre, the Province or a local authority, to refrain from doing that which he is not permitted by law to do, or to do that which he is required by law to do; or

(ii) declaring that any act done or proceeding taken in the Province by a person, performing functions in connection with the affairs of the Centre, the Province or a local authority, has been done or taken without lawful authority, and is of no legal effect; or

(b) on the application of any person, make an order -

(i) directing that a person in custody in the Province be brought before the High Court so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person in the Province holding or purporting to hold a public office to show under what authority of law he claims to hold that office;(1) or

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(1) Substituted by the Constitution (First Amendment) Act 1963 (1 of 1964) Sec.6, for the full-stop.

(1)
(c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government, exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court, as may be appropriate for the enforcement of any of the fundamental rights conferred by Chapter I of Part II of this Constitution.

3) An order shall not be made under clause 2) of this Article -

(a) on application made by or in relation to a person in the Defence Services of Pakistan in respect of his terms and conditions of service, in respect of any matter arising out of his service or in respect of any action taken in relation to him as a member of the Defence Services of Pakistan; or

(b) on application made by or in relation to any other person in the service of Pakistan in respect of his terms and conditions of service, except a term or condition of service that is specified in this Constitution.

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(1) Paragraph (c) added ibid.

4) Where -

(a) application is made to a High Court for an order under paragraph (a) [1](or paragraph (c)) of clause 2) of this Article; and

(b) the Court has any reason to believe that the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or of otherwise being harmful to the public interest,

the Court shall not make an interim order unless the prescribed law officer has been given notice of the application and the Court, after the law officer [1](or any person authorised by him in this behalf) has been given an opportunity of being heard, is satisfied that the making of the interim order would not have the effect referred to in paragraph (b) of this clause.

5) In this Article, unless the context otherwise requires -

"person" includes any body politic or corporate, any authority of or under the control of the Central Government or of a Provincial Government and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Defence Services of Pakistan ;

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(1) Inserted by the Constitution (First Amendment) Act 1963 (1 of 1964) sec.6.

"prescribed law officer" means -

(a) in relation to an application affecting the Central Government or an authority of or under the control of the Central Government - the Attorney-General; and

(b) in any other case - the Advocate-General of the Province in which the application is made.

Article 98 of the Constitution differs from the previous provisions of 1956 Constitution. It speaks of orders and omits the word "writ." Further the jurisdiction is conferred only on the High Courts. No writ or "order" can therefore, be issued directly to the Supreme Court, except on appeal by leave under Article 58 (3) from a High Court.

Speaking at the Civil Services Academy on April 25th,1964, Cornelius C.J. said,(1)

"Now in Pakistan, we have Article 98 and the ancient names of the writ have been eliminated from the Constitution, although the categories distinguish themselves easily under those names, and they will always be used with their specific meanings in judgments. In Article 98 the true content of each of the major writs has been set out in the long form of words. The object probably was to attain certainty as to the

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(1) P.L.D. 1964 Journal 73.

limits within which the Court may act. Previously in each case the Courts referred to precedents from England, the United States, India and several other countries, to determine whether they had power to interfere in case before them. It is perhaps supposed that this may not be necessary, now that the powers are stated not by label, but by full expression. However, it is to be remembered that the superior Courts have the power and duty of interpreting the words of the Constitution and it is difficult to suppose that earlier precedents will lose their value as guidance. In the new Article there are verbal changes in respect of the availability of the writ to public servants, for the protection of their rights in the public service."

The West Pakistan High Court has said (1) that whereas, under the Constitution of 1956, the Courts had to gather the scope of the named writs from text books and cases, the Constitution of 1962 attempts to reduce the substance of the writs into self-contained propositions. Incidents which, in the course of their evolution, have been attached to some of the writs, but which are not of the essence of the remedy, are not incorporated. The field of some writs has been enlarged; certiorari is no longer restricted to judicial

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(1) Mahboob Ali Malik v. West Pakistan, P.L.D.1963 Lah.575.

matters. Any order passed in excess of lawful authority can be declared without legal effect.

A writ is defined by Blackstone (1) as "a mandatory letter from the King in Parliament, sealed with his Great Seal, and directed to the Sheriff of the County wherein the injury is committed or the respondent is supposed so to be, requiring him to command the wrong-doer or party accused, either to do justice to the complainant or else to appear in Court, and answer the accusation against him."

Habeas Corpus.

The writ of habeas corpus is a writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the Court or Judge awarding the writ shall consider in that behalf. It is a legal process designed and employed to give summary relief against illegal restraint of personal liberty. (2)

Generally the writ of habeas corpus is issued in cases

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(1) Blackstone, Commentaries (iii), C.18.

(2) Ferris & Ferris, "The Law of Extraordinary Legal Remedies" P.21, 22.

of illegal and improper detention in public or private custody but the writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty.(1) In brief the writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful detention whether in prison or in private custody.

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(1) Rao Mahroz Akhtar v. District Magistrate, P.L.D. 1957 Lah. 676.

Historical Development in England.

The right of personal liberty, the most precious of all rights, rests upon the common law, which was defined and declared by Magna Carta. The subject was therefore always legally free from detention, except on a criminal charge or conviction or for civil debt. At common law any free man imprisoned was entitled to demand from the Court of King's Bench a writ of habeas corpus, or corpus cum causa as it was called, directed to the keeper of the prison, and commanding him to bring up the body of the prisoner, with the cause of the caption and detention, in order that the Court might judge its sufficiency and either remand the prisoner, admit him to bail, or discharge him according to the nature of the charge. In the fifteenth century it was used by the central courts to supervise commitments made by local and feudal courts; in the sixteeth it was used in the contest with the prerogative and admiralty courts, in the course of which it became apparent that the writ could be employed in the defence of the liberty of the person.(1)

The writ was issued as a matter of right, and ex debito justitiae, and could not be denied. It however possessed various defects, which caused much delay in obtaining the writ;

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(1) Thomas Pitt Taswell-Langmead, English Constitutional History, 10th Ed. Page 483.

but a more serious matter was the attempt made by the Crown to defeat the right altogether, by maintaining that "the special command of the king" was per se a sufficient cause to justify the commitment and detention of a subject. This important point was elaborately argued in Court and in Parliament in the great case of the Five Knights[1], during the reign of Charles I, who levied and exacted a general loan from every subject, in order to find funds for carrying on the war with Spain, the common man who refused to contribute was punished by impressment into the army or the navy; many of the gentry were committed to prison; several regiments of soldiers were sent into different countries and quartered upon the inhabitants, and in some places martiel law was enforced. Out of many persons imprisoned throughout England for refusing the loan, five applied for writs of habeas corpus in the King's Bench, to which the Warden of the Fleet returned that they were detained under a warrant from the Privy Council "by special command of the king." This gave rise to a most important discussion as to the sufficiency of such a return as a legal cause of detention, there being no charge made against the prisoners. The decision of the Court was in favour of the Crown, and the

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(1) Darnel's Case, 1627. 3 St. Tr. 1.

prisoners were remanded to custody - a custody which, by this judgment, might be indefinitely prolonged, without any specific charge being brought against the prisoners or any trial with its consequent condemnation or acquittal.(1) The judgment however spread indignation among the people, who saw their right of personal liberty practically annihilated by this decision.

After the decision in Darnel's case, the King's power of arrest was discussed at length in Parliament, and, despite the need recognized by many members for a discretionary power of arrest in emergencies, the majority would not hear of any limitation on the freedom of the subject, and eventually the result was the petition of Right drawn up by the Commons, to which the Royal Assent was accorded on June 7th, 1628 (3 Car.1.C.1 The Petition of Right declared against the decision in Darnel's case.

This Act, after reciting among other things, Magna Carta and the statute of Edward III C.3 states that:-

"nevertheless against the tenor of the said statutes, divers of your subjects have of late been imprisoned without any cause shown; and when for their deliverance they were brought before your justices by your Majesty's writs of habeas corpus, there to undergo and receive as the Court should

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)1) Constitutional History. Thomas Pitt Taswell- Langmead P.410.

order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but they were detained by your Majesty's special Command, signified by the lords of your privy council; and yet were returned back to several prisons, without being charged with anything to which they might make answer according to law."

This Act regulated the Privy Council and dissolved the Star Chamber. It contained a clause providing that any person imprisoned by order of the abolished Star Chamber and other arbitrary Courts, or by command or warrant of the king's majesty in his own person, or by command or warrant of the council board, or of the lords or others of his majesty's privy council, should be entitled to a writ of habeas corpus from the Courts of King's Bench or Common Pleas, without delay upon any pretence whatsoever; that the officer, having the prisoner in custody should produce him and certify the cause of his detention and that the Court before which the prisoner was produced should either remand, bail, or deliver him within three court days of the writ's return. A violation of this section was punishable by treble damages.

In 1676 the delay and difficulty in procuring a habeas corpus was forcibly exemplified in the case of Francis Jenkes.(1)

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(1) 6 St. Tr. 1190, 1193. (Ed.1676)

A citizen had delivered a speech at the Guildhall, urging that a Common Council should speedily be held to petition the king, in the name of the City, to call a new parliament. For this he was summoned before the Privy Council and committed to prison. Various attempts were unsuccessfully made to obtain his release. The Court of Quarter Sessions for Westminster refused to admit him to bail, on the plea that he had been committed by a superior court, or to try him because he was not entered in the Calendar of prisoners. The Lord Chancellor, on being applied to for habeas corpus, refused to issue it during the vacation, and the Chief Justice of the King's Bench, to whom in the next place recourse was had, made so many difficulties that Jenkes lay in prison many weeks before he was eventually enlarged on bail.

Three years after the proceedings in Jenkes case in 1679, the famous Habeas Corpus Act was passed "for the better securing of the liberty of the subject, and for prevention of imprisonments beyond the seas." It was restricted to cases of persons imprisoned before sentence for 'criminal or supposed criminal matters.' Its aim was to circumvent all the devices by which the effect of the writ of habeas corpus could be avoided both on the part of judges and of the gaoler.

The statute introduced no new principle, though the occasion for passing it was cogent, viz; the arbitrary imprisonment of the subject by the King himself. "The nation had been partially awakened to the question of several instances of a like character in that and the previous reign, attended with other acts of evasion, by which trials were greatly delayed. This was the reason for that part of the habeas corpus act, directing the bailing or discharging of persons properly imprisoned, if their trials were unreasonably postponed."(1)

The Act of 1679 was, however, subject to three defects.

1) It fixed no limit on the amount of bail which might be demanded

2) It only applied to commitments on criminal or supposed criminal charges; all other cases of unjust imprisonment being left to the habeas corpus at common law, as it subsisted before this enactment.

3) It did not guard against falsehood in the return.

The first of these defects was remedied in 1689, by the Bill of Rights, which declared "that excessive bail ought not to be required." The other two subsisted down to the year

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(1) Mr. Hill in his note to Mcleod Case, 3 Hill, 647.

1816, when they were at length removed by "An Act [1] for more effectually securing the liberty of the subject." By this Act, in addition to various minor but important improvements, the statutory remedy was extended to cases of imprisonment on non-criminal charges, and the judges were empowered to examine and determine the truth of the facts set forth in the return, and in all cases of doubt to bail the prisoner.

James II attempted to set the King above law and to revive and extend the royal prerogative; he endeavoured to establish or extend the royal power to suspend or dispense with the laws. For this purpose, a case [2] was brought by an informer against the defendant, whom the King had appointed Colonel of a foot regiment, and who had not taken certain oaths, nor received the sacrament, indicating thereby that he was a protestant. The defendant pleaded a dispensation granted by the King, discharging him from the obligation placed on him by the statute.

The Plaintiff's argument was that the King might dispense with the penalty for an individual breach of a penal statute,

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(1) 56 Geo. III, C.100

(2) Godden v. Hales, (1686) 11, St. Tr. 1165.

where no other person was prejudiced or a breach of a statute, enacted for the benefit of the Crown but not with a statute made for the general welfare of the public. It was held by the majority that the King's prerogative extended to dispensing with all penal laws, in particular cases and for necessary reasons, the King being the sole judge of the necessity. God, they said, may dispense with His own laws; the laws of England are the King's laws, and any law may be dispensed with by the law giver. This was a victory for the Crown but of short duration. Three years later the same King lost his throne and this decision was nullified by the provisions of the Bill of Rights, which is the third great charter of English liberty. It stated :-

"That the pretended power of suspending of laws or the execution of laws by legal authority, without consent of Parliament, is illegal.

That the pretended power of dispensing with laws or the execution of laws by legal authority, as it hath been assumed and exercised of late, is illegal."

The Bill of Rights finally declared the supremacy of the British Parliament, which was established, not so much by judicial decisions, as by armed conflict. The Bill of Rights recited all the outstanding points of dispute between King and

subject, James II's claim to suspend laws, to dispense with their operation, and to maintain a standing army among others and decided against the King. Though the Bill of Rights abolished the suspending power outright, yet its validity had always been doubtful. It condemned the dispensing power only "as it hath been used and exercised of late," and contemplated a statutory regulation of its exercise, which was never carried out. However, the Courts admitted that the powers of the King were subject to restriction by statute, and they regarded as valid the limitations imposed by the Bill of Rights.
The Act of Settlement of 1701 deprived the Crown of the only remaining means of interference with the course of law as it provided that the judges should hold their offices, not at the King's pleasure, but during good behaviour, being subject to dismissal only upon an address of both Houses of Parliament.

The Act of 1862 provides that the writ of habeas shall issue out of England by authority of any judge or Court of Justice therein, into any colony or foreign dominion of the Crown, where Her Majesty has a lawfully established Court or Courts of Justice, having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony and dominion.

According to Dicey,(1) the net result of the habeas corpus

(1) Dicey, "Law of Constitution" P..218.

procedure is that "while the Habeas Corpus Act is in force, no person committed to prison on a charge of a crime can be kept long in confinement, for he has the legal means of insisting upon either being let out upon bail, or else of being brought to speedy trial."

The Habeas Corpus Acts have occasionally been suspended in times of great public danger for a limited time, so as to allow the Government to detain persons on mere suspicion and to keep them in custody without trial. In critical times there is a presumption that the liberty of the subject should be sacrificed in the interest of the welfare of the State. As Sir T. Carr mentioned in his work,(1) "nations cannot now-a-days wait for hostilities before arming themselves with crisis powers ... as emergencies are seen to be intensified, there is naturally a greater need and readiness to tighten up the law ..... Enemy action may require departure from the slow and stately process of peace time criminal justice."
To quote Dicey,(2) "During periods of political excitement, the power or duty of the courts to issue a writ of habeas corpus, and thereby compel the speedy trial or release of persons

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(1) Concerning English Administrative Law. Edn.(1941) P.72-78

(2) Dicey, "Law of Constitution" P.228 - 229.

charged with crime, has been found an inconvenient or dangerous limitation on the authority of the executive government." "In former times it was the practice in times of danger to the State to pass what were popularly known as the Habeas Corpus Suspension Acts.(1) These Acts, in effect, prevented the use of the writ of habeas corpus for the purpose of insisting upon speedy trial or the right to bail in the cases of persons charged with treason or other specified offences. They did not suspend generally the use of habeas corpus proceedings, and, as soon as the period of suspension in relation to a particular crime was passed, anyone, who for the time being had been denied the assistance of the writ, could seek his remedy in the Courts by an action for false imprisonment or malicious prosecution. Suspension did not legalise illegal arrest; it merely suspended a particular remedy in respect of particular offences. Accordingly it was the practice, at the close of the period of suspension, to pass an Indemnity Act, in order to protect officials concerned from the consequences of any incidental illegal acts, which they might have committed under cover of the suspension of the prerogative writ. During a period of emergency, many

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(1) Dicey, "Law of Constitution." P.229

illegalities may be committed by the Executive in their effort to deal with a critical situation. The object of the suspension was to enable the government to take steps, which though politically expedient, were, or might be, not strictly legal. An Indemnity Act legalises all such illegalities and so supplements a suspension Act, which may not have given to the Executive all the power that it required."(1)

During the years 1715 and 1745, when the safety of the realm was endangered by Jacobite Rebellions, the Habeas Corpus Acts were suspended by an Act of Parliament. In 1794, 34 Geo III was passed after the execution of Louis XVI in France in 1789. This Act began with the preamble "whereas a traitorous and detestable conspiracy has been formed for subverting the existing laws and constitution, and for introducing the system of anarchy and confusion, which has so fatally obtained in France ... " Its main object was to suspend the writ of habeas corpus; persons arrested under a warrant of the King and six Privy Councillors, or by warrant of a Secretary of State, for treason, or treasonable practices were to be detained "without bail or mainprize," till 1st February, 1795, and no judge was under an obligation to release them under the provision of any law or statute contrary to the Act.

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(1) Wade & Phillips "Constitutional Law." P.354 -355.

Neither during the First nor the Second World War was there any direct suspension of habeas corpus. The Defence of Realm Acts 1914-15, empowered the Executive to make regulations by Order in Council for securing the public safety or for the defence of the realm. In Halliday's case[1] it was held that this general power was wide enough to support a regulation authorising imprisonment without trial.

A person detained under a valid regulation, giving unrestricted power to detain, cannot subsequently bring an action for false imprisonment, in order to test the merits of his detention. Thus, though habeas corpus proceedings are not suspended, there is a greater infringement of liberty in giving the Executive unrestricted power to detain than in suspending habeas corpus proceedings in respect of particular charges.[2] Despite the wide powers conferred by the Defence of the Realm Acts, numerous illegalities were undoubtedly committed and, after the War, the Indemnity Act, 1920, and a separate Act, relating to illegal charges, the War Charges Validity Act, 1925, were passed.

During the Second World War, the Emergency Powers (Defence)

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(1) Rex v. Halliday, 1917, A.C.260

(2) Wade & Phillips "Constitutional Law" P.355, 356.

Act, 1939, empowered the making of regulations by Order in Council "Defence Regulations" for five general purposes, the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of any war in which His Majesty might be engaged; and the maintenance of supplies and services essential for the life of the community. There followed a list of particular purposes for which regulations could be made, without prejudice to the generality of the five enumerated purposes; these included a power to try offenders against the regulations in special courts, a power to make provision for the detention of persons by the Secretary of State in the interests of public safety or the defence of the realm and authority to enter and search premises. This was followed by other emergency measures.(1)

Dicey,(2) summing up the whole position, observed :- "It cannot be disputed that the so-called suspension of Habeas Corpus Act, followed by an Act of Indemnity, is, in reality, a far greater interference with personal freedom than would appear from the very limited effect, in a merely legal point of view, of suspending the right of persons accused of

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(1) Wade & Phillips "Constitutional Law" P.355, 356.

(2) Dicey "Law of Constitution" P.235-236.

treason to demand a speedy trial. The Suspension Act, coupled with the prospect of an Indemnity Act, does in truth arm the executive with arbitrary powers. Still, there are one or two considerations, which limit the practical importance, that can fairly be given to an expected Act of Indemnity. The relief to be obtained from it is prospective and uncertain. Any suspicion on the part of the public, that officials had grossly abused their powers, might make it difficult to obtain a parliamentary indemnity for things done, while the Habeas Corpus Act was suspended. As regards, again, the protection to be derived from the Act by men who have been guilty of irregular, illegal, oppressive, or cruel conduct, everything depends on the terms of the Indemnity. These may be either narrow or wide ..... An Act of Indemnity, <u>again though it is the legalisation of illegality,</u> is also, it should be noted, itself a law. It is something in its essential character, therefore, very different from the proclamation of martial law, the establishment of a state of siege, or any other proceedings, by which the executive government, at its own will, may suspend the law of the land. It is no doubt an exercise of arbitrary sovereign power; but where the legal sovereign is a Parliamentary assembly, even acts of state assume the form of regular legislation; and this fact of itself maintains in no small degree the real, no less than the apparent supremacy of law."

Habeas Corpus in Indo-Pakistan sub-Continent.

The history of Habeas Corpus in the sub-continent begins with the grant of Letters Patent to Supreme Court in Calcutta in 1773. Now Section 491 of the Criminal Procedure Code 1898, empowers any High Court in India to issue directions in the nature of habeas corpus and whenever it thinks fit, except in the case of persons detained under the Bengal State Prisoners Regulation 1818, Madras Regulation II of 1819, Bombay Regulation XXV of 1827 or the State Prisoners Act, 1858.

A case(1) was brought before the Supreme Court of Calcutta and the question arose whether the Supreme Court of Calcutta could issue a writ of habeas corpus for the production of a person confined beyond the limits of Calcutta. It was held that the issuing of this high prerogative writ, not being a matter of ordinary original civil jurisdiction and being made in the Supreme Court, not on any side, such as the plea side or the equity side of the Court, the limits within which such writs could be issued were not affected by the 11th clause of the Charter of 1865 and the local limits within which such habeas corpus could be issued depended on the

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(1) In the matter of Ameer Khan (1870) 6, Ben.L.R. 392.

jurisdiction, which the late Supreme Court possessed under the Charter of 1774. It was accordingly held that the High Court had jurisdiction to issue a writ of habeas corpus into the mofussil, outside the original jurisdiction, as the Supreme Court had powers to issue writs of habeas corpus in the same manner as they were issued in England and the same power was conceded to the High Courts under their respective charters.

In 1872 the Code of Criminal Procedure (Act X of 1872) was enacted. Two sections were introduced in that Code, namely sections 81 and 82, the later enacting that,

"neither the High Courts nor any Judge of such High Court shall issue any writ of habeas corpus, mainprise de homine replegiando nor any other writ of the like nature beyond the Presidency Towns."

In 1875 the High Courts Criminal Procedure Act (X of 1875) was passed. Section 148 of that Act set out various purposes for which an order in the nature of habeas corpus might be made and it gave power to the High Courts to make such orders in the case of persons within the limits of their original jurisdiction.

Thus, the power to issue writs of habeas corpus, except as provided in those Acts, was expressly withdrawn from the

High Courts. When the Code of Criminal Procedure was amended in 1882 the Acts of 1872 and 1875 were included in Sch. I as enactments repealed by section 2 "but not so as to restore any jurisdiction or form of procedure not existing or followed of 1st January 1883". The Code was again amended by Act V of 1898 and the same provision was re-enacted as Section 491 of the present Code of Criminal Procedure. The matter remained very much in the same position until 1923, when the Code was amended by the Criminal Law Amendment Act, (Act XII of 1923) and a right was given to everybody within the Appellate Criminal Jurisdiction of any High Court to make an application to that Court, under Section 491 of the Code.

It would seem to follow from the above that, under Codes of 1882 or of 1898, the High Court could not issue any writ of habeas corpus for any of the purposes mentioned in section 491 of the Criminal Procedure Code, apart from the provisions of the Code.

A full bench of Madras High Court held,(1) that the High Court or any Judge of it could not issue a common law writ of habeas corpus in any case covered by section 491 of Criminal Procedure Code. This view was reaffirmed by the Privy

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(1) District Magistrate v. M. Mappillai, A.I.R. (1939) Mad.120

Council.[1] Their Lordships of the Privy Council cited with approval the following observations of the Chief Justice of the Madras High Court, who delivered judgment on behalf of the full bench :

"The High Courts Act of 1861 authorised the Legislature, if it thought fit, to take away the power, which the Court obtained as the successor of the Supreme Court and Acts of the Legislature, lawfully passed in 1875 and subsequent years, leaves no doubt in my mind that the Legislature has taken away the power to issue the prerogative writ of 'habeas corpus' in matters contemplated by section 491 of Criminal Procedure Code of 1898."

In brief, the courts in the sub-continent had no jurisdiction to issue the common law writ of habeas corpus and to exercise the power which the courts in England exercise. The powers of the courts are now controlled by section 491 of Criminal Procedure Code, which has taken the place of the old common law writ of habeas corpus.

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(1) Matthen v. District Magistrate, A.I.R. (1939) P.C.213.

Habeas Corpus in Pakistan.

The history of habeas corpus was traced by Shabir Ahmad,J; in Muhammad Anwar's[1] case in the following words :-

"The jurisdiction to issue orders of the nature of habeas corpus has been with High Courts for a very long time. Originally when the present Code of Criminal Procedure (Act V 1898) was passed in 1898, jurisdiction to pass an order under section 491 thereof was conferred only on three High Courts, namely, those of Calcutta, Bombay and Madras, which were called the Presidency High Courts. By an amendment brought about in the section in 1923 by means of section 3 of the Criminal Procedure Code (Amendment) Act, 1923 (XII of 1923), the power to issue orders under section 491 of the Code of Criminal Procedure was conferred on all High Courts. Another change which was brought about by the abovementioned amending Act of 1923 was that, whereas at the beginning, an order under section 491 of the Code of Criminal Procedure could be passed only with regard to persons within the ordinary original civil jurisdiction of the three High Courts that had power to act, the amending Act conferred jurisdiction on all High Courts to pass orders with regard to persons in places within the limits of their criminal appellate jurisdiction. The

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(1) Muhammad Anwar v. Govt. of West Pakistan, P.L.D.1963 Lah. 109 F.B.

marginal note of section 491 of the Code of Criminal Procedure is to the effect that the High Courts could issue directions in the nature habeas corpus. The position continued like this till the partition of British India, to which territory the Act was applicable, but sometimes in 1953, Section 223-A of the Government of India Act, 1935, which Act continued to be the Constitution of Pakistan for quite some nine years after its establishment, was added. This section gave the High Courts powers to issue some writs, including that of habeas corpus and that power continued till the 23rd of March 1956, when the Constitution of Islamic Republic of Pakistan came into force, which conferred powers of issuing writs on the High Courts. The Constitution Act of 1956 was abrogated on the night of the 7th October, 1958, when the whole of Pakistan was placed under Martial Law but, even during the Martial Law regime, powers of the High Courts to issue those and some other specified writs were made in the Laws (Continuance in Force) Order, 1958. Then came the Constitution of 1962, which is now in force. By its 98th Article, the new Constitution confers on High Courts the power to set free persons detained in unlawful custody."

Object of Habeas Corpus

The right of a person to petition for habeas corpus is a high prerogative right and is a Constitutional remedy for all matters of illegal confinement.(1) "The writ has for its object the speedy release, by judicial decree, of persons who are illegally restrained of their liberty. It also lies where a party is held by one person, when another is entitled to his custody, in which case the court is empowered to deliver him from the unlawful imprisonment by committing him to the custody of the person who is by law entitled thereto, as in the cases of infants and insane persons. The purpose of the writ is not to punish for the wrongful act of restraining petitioner, or to afford him redress for his illegal detention. Such is not its design, nor can judgment thereunder be entered against anybody therefor. Nor does it concern, necessarily, the wrongful act causing the detention. It is simply confined to compelling the immediate human instrument of the unlawful restraint to restore his victim to liberty, notwithstanding any charge made against him."(2)

Although the writ of habeas is a writ of right, it is not a writ of course. There are authorities to support the view

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(1) Farid Ahmad v. Govt. of West Pakistan, P.L.D.1965 Lah.135

(2) Ferris and Ferris, "The Law of Extraordinary Legal Remedies," 1926 P.23, 24.

that, even if a fit case has been made out, showing ex facie a want of jurisdiction in the authority making an order of commitment, yet if it appears to the Court that it is a purely technical defect, or the conviction is otherwise valid, the Court may not interfere even in those circumstances.(1) It has been observed :-

"The writ is one of right, but not of course, and issues only on reasonable cause shown. Allowance of the writ is a judicial, not a ministerial act. Its issuance is not a perfunctory operation to be had for the asking. While by statute it may issue as a matter of course, when the petition shows on its face that there is a cause therefor, yet even the Federal Courts will be cautious, especially when it is on behalf of state prisoners. It will not issue as a matter of course, where it would be vain or futile, or obvious that, on final hearing, petitioner must be remanded to custody, for the law does not require a vain act, or where the petition shows on its face that detention is legal, or unless the petition is in substantial compliance with statutory provisions."(2)

The whole object of proceedings for writs of habeas corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible.

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(1) Abdul Hannan v. Govt. of East Pakistan, P.L.D.1959 Dacca 279

(2) Ferris and Ferris "The Law of Extraordinary Legal Remedies," 1926 P.25-26.

When there is no question of fact to be examined or determined, no affidavit is needed. But if a fact is disputed, affidavits are needed. If the detention is under the orders of the detaining authority in the exercise of its plenary discretion or a person is detained under the orders of Court, no affidavit is called for. But in any other case, the detaining authority has to justify his action by disclosing facts, which would satisfy the Court that the custody is not improper.(1)

The writ of habeas corpus is of a remedial nature and is not used as an instrument of punishment.(2) The object of the writ is not to punish previous illegality, but to release from previous illegal detention.(3) It is inapplicable, if the illegal detention has ceased before the application for the writ is made. When it is clear that the person charged with unlawfully detaining another, whether a child or an adult, has de facto ceased to have any custody or control, the writ ought not to issue.(4) In a case,(5) on an application by the parent for a writ of habeas corpus in respect of a child,

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(1) Ranjit Singh v. State of Pepsu, A.I.R.1959 S.C.843

(2) Barnardo v. Ford Gossage, 1892 A.C.326.

(3) Rex v. Home Secretary, Ex parte O'Brien (1923) 39 T.L.R. 487.

(4) Halsbury "Law of England," Vol.IX Para.1204 P.705

(5) Barnardo v. Ford Gossage, 1892 A.C.326.

directed to the head of an institution for destitute children, in which the child had been placed, it appeared that, before the proceedings began, he had, without authority from the parent, handed over the child to another person to be taken to Canada and he alleged that he did not know where he or the child was. The Court of Appeal affirmed an order absolute of the Queens Bench Division that the writ should issue. The House of Lords held that the writ was properly issued, on the ground that the applicant was entitled to have the facts fully investigated on the return. Lord Watson observed, "The remedy of habeas corpus is, in my opinion, intended to facilitate the release of persons actually detained in unlawful custody and was not meant to afford the means of inflicting penalties on those persons by whom they were at some time or other illegally detained .... "

In the general sense, the writ of habeas corpus may issue to test the validity of any detention whether by the Executive or by a private person or by any other authority exercising judicial or quasi-judicial powers; but in such proceedings the answer to the writ is usually considered to be sufficient, if a valid commitment order is produced by the detaining authority and where a person has been convicted by a Criminal Court, ex facie there is such a valid order for the detention of the person concerned. Therefore, in cases where

the writ is taken out to challenge the validity of a conviction by a Criminal Court, its scope is somewhat restricted and it may be said that, in such cases, the Court will only interfere by a writ of this nature, if it clearly appears to it, on the record itself or on the face of the commitment order, that the act for which the person concerned is committed is no crime or, if it is a crime, he has been committed for it by a person who has no jurisdiction so to commit him or if the sentence imposed upon him is in excess of that prescribed by law. It is now universally accepted that a writ of this nature cannot issue to question the propriety or correctness of the decision of an inferior Court on any matter which is within its jurisdiction to decide, for, a Court has a jurisdiction to decide either rightly or wrongly. The writ is not, by any means, a substitute for appeal.(1)

The Court has power to see that the document authorising detention is on the face of it valid and the authority ordering detention has acted within the limits prescribed by law or whether any fundamental right has been contravened. Enquiry into all these questions is permissible, because each

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(1) Abdul Hannan v. Govt. of East Pakistan, P.L.D.1959 Dacca 279.

of them affects the legality of the arrest. Thus the High Court may set at liberty a person detained under the Frontier Crimes Regulation, if his detention is ordered in violation of a provision of the Regulation.(1) In a recent case (2) it was observed that "Habeas Corpus is essentially a writ of inquiry, and upon matters in which the state itself is concerned, in aid of right and liberty, though private rights may be involved. It by no manner of means follows that the prayer of petitioner will be granted, because the writ has been ordered to issue. The writ simply brings the parties before the Court for the ascertainment of the facts of the case. The Court is clothed with the power, with a sound discretion, to grant or refuse relief."

In Ghulam Jilani's case(3) the Supreme Court held that, "Power is expressly given by Article 98 to the Superior Court to probe into the exercise of public power by executive authority, how high soever, to determine whether they have acted with lawful authority. The judicial power is reduced to a nullity, if laws are so worded or interpreted that the executive authority may make what statutory rules it pleases

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(1) Ali Muhammad v. Commissioner, F.C.R. Quetta, Division P.L.D. 1964 Quetta 1.

(2) Nasim Fatima v. Govt. of West Pakistan, P.L.D.1967 Lah.103 (F.B.)

(3) Malik Ghulam Jilani v. Govt.of West Pakistan, P.L.D.1967 S.C.373.

thereunder and may use this freedom to make themselves the final Judges of their own "satisfaction" for imposing restraints on the enjoyment of the fundamental rights of citizens. Article 2 of the Constitution could be deprived of all its content through this process and the Courts would cease to be guardians of the nation's liberties."

The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. Where the detention of an individual is under process for criminal or supposed criminal causes, the jurisdiction of the Court and the regularity of the commitment may be inquired into. Where the restraint is imposed on civil grounds under claim of authority, the legal validity of such claim may be inquired into. Where the restraint is imposed on civil grounds under claim of authority, the legal validity of such claim may be investigated and determined, and where, as frequently occurs in the case of infants, conflicting claims for the same individual are raised, such claims may be inquired into on the return to the writ of habeas corpus, and the custody awarded to the proper person. In other cases, where the personal freedom of an individual is wrongfully interfered with by another, the release of the former from the illegal detention may be effected by habeas corpus. The illegal

detention of a subject, that is a detention or imprisonment, which is incapable of legal justification, is the basis of jurisdiction in Habeas Corpus.(1)

The right of a person to a petition for habeas corpus is a high prerogative right and is a Constitutional remedy for all matters of illegal confinement. This is one of the most fundamental rights known to the Constitution. There being no limitation placed on the exercise of this right, no actual or assumed restriction can be imposed by any subordinate legislation. If the arrest of a person cannot be justified in law, there is no reason why that person should not be able to invoke the jurisdiction of the High Court immediately for the restoration of his liberty, which is his basic right. In all cases where a person is detained and he alleges that his detention is unconstitutional and in violation of the safeguards provided in the Constitution, or that it does not fall within the statutory requirements of law under which the detention is ordered, he can invoke the jurisdiction of the High Court under Article 98 of the Constitution of Pakistan (1962) and ask to be released forthwith.(2)

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(1) Halsbury, "Laws of England," Vol. IX. P.702

(2) Farid Ahmad v. Govt. of West Pakistan, P.L.D.1965 Lah.135.

It is thoroughly established that, in habeas corpus proceedings, the Court is confined to the examination of fundamental and jurisdictional questions. The question to be considered is, not whether the judgment was erroneous, but whether the Court had jurisdiction to try the issue and to render the judgment. The Court examines only the power and authority to act, not the correctness of the conclusions. Judgments of Courts cannot be treated as void and attacked by habeas corpus, even if errors or irregularities have actually supervened, if the Court has jurisdiction; and this is so, even if such errors or irregularities be subject to review, and even if they would necessarily result in reversal of the judgment. This is so for the very reason that errors and irregularities, which do not go to the jurisdictions of the Court, may thus be inquired into on motion, appeal or writ of error.(1)

Under Article 98, clause (2) (b) (i), the High Court may, on theapplication of a person, not necessarily an aggrieved party, if there be no other adequate remedy, direct a person in custody in the Province to be produced to satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner.

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(1) Ferris & Ferris, "The Law of Extraordinary Legal Remedies." P.39.

Under Fundamental Right No. I, there is a declaration that no person shall be deprived of life or liberty, save in accordance with law and Fundamental Right No.2 embodies safeguards in respect of arrest and detention but these safeguards are not available to a person

(a) who is for the time being an enemy alien or

(b) who is arrested or detained under any law providing for preventive detention.

For the persons who are detained under any law relating to preventive detention, the safeguards are :-

(i) that no person detained under any such law can be detained for a period exceeding three months unless, before the expiration of that period, the Government obtains from the Advisory Board the opinion that there is sufficient cause for such detention.

(ii) the authority making the order of detention must, as soon as possible, communicate to the arrested person the grounds for his detention, unless the disclosure of any particular ground be against the public interest, and afford him the earliest opportunity of making a representation against his detention.

The provisions of a statute which imposes restrictions on the personal liberty of a subject must be strictly and

rigorously complied with and unless such order is passed in strict conformity with the provisions of the detention law, however formal in character they may appear to be, and all the statutory obligations enjoined on the detaining authority are carried out to the letter, the order will not be upheld.(1) It is the very purpose of habeas corpus that, when any person has been deprived of his liberty in an unlawful manner or without lawful authority, or when the safeguards guaranteed are not taken into consideration, the detenu has a right to petition for habeas corpus, and in the majority of cases,(2) the court has held the order void and has set the detenu at liberty. Some of the instances are reproduced here :-

> When all the grounds on which the order of detention is made, are not communicated to the detenu,(3) or
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> when the grounds are vague and indefinite and do not enable the detenu to make a representation against his detention,(4) or
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> when the order of detention is mala fide,(5) or
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> when the satisfaction of the detaining authority is not based on reasonable grounds,(6) or

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(1) Siraj-ud-Din v. The State, P.L.D.1957 Lah.962
Rehmat Illahi v. Govt. of West Pakistan, P.L.D.1965 Lah.112

(2) The cases have been discussed in detail in the Chapter V.

(3) Ghulam Mohd.Khan v.The State, P.L.D.1957 Lah.497

(4) State of Bombay v.Atma Ram, A.I.R.1951 S.C.157

(5) Abuzar v. Prov.of West Pakistan,P.L.D.1966(W.P) Kar.260

(6) Ghulam Gilani v.The Govt.of West Pakistan,PLD.1967 SC.373

where the grounds are not communicated as soon as may be,[1] a petition for habeas corpus will lie.

"The remedy by habeas corpus is equally available in Criminal and Civil cases: Provided that there is a deprivation of personal liberty without legal justification or personal justification. Many of the purposes to which the writ has been applied in the past are of historical interest rather than of present importance..... In modern practice the purposes to which the writ is most frequently applied are :-

1) the testing of the regularity of commitment and particularly in cases of the commitments for extradition and of fugitive offenders; and

2) the investigation of the right to the custody of Infants.[2]

The obvious purpose of habeas corpus is to procure the release of a person in illegal custody, but it also provides a means of calling in question the original arrest of a person, who has subsequently been released on bail, for in the eyes of law, he is then transferred to the custody of his sureties.[3] It has also been used to impugn an order of

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(1) Ghulam Ullah Khan v. Dist.Magistrate, Campbellpur, P.L.D.1967 Pesh. 195 D.B.
Mohd. Aslam Malik v. Province of West Pakistan, P.L.D.1968 Lah.1324

(2) Halsbury, Laws of England, Vol.IX P.713.

(3) Sandal Singh v.Dist.Magistrate,A.I.R.1934 All.148.

externment,(1) but it does not lie to protect a person from police surveillance.(2)

Adequate Alternative Remedy.

An essential condition precedent to the issue of the writ under Article 98 (62) is that the High Court should be satisfied that no other adequate remedy is provided by law. Thus, by an express provision of the Constitution the jurisdiction to give an aggrieved party the relief, which has been provided by Article 98, depends upon the question whether the petitioner has any other adequate remedy. If he has, he is not entitled to ask for any relief thereunder.(3) The tests for determining the scope and adequacy of such remedy were laid down in the judgment of the Full Bench of West Pakistan High Court,(4) in which it was held that, to oust the Court's jurisdiction under Article 98, not only should there be an alternative remedy but it must also be adequate. It is for the High Court itself to decide whether, in the particular circumstances, the alternative remedy is adequate or not. The Court ruled that, "the alternative

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(1) N.B.Khare v. State of Delhi, A.I.R.1950 S.C.211.

(2) Bimla v. Chaturvedi, A.I.R.1953 All.613.

(3) Lutf-un-Nissa v. Deputy Commissioner, P.L.D.1964 Dacca 132.

(4) Mahboob Ali Malik v. The Province of West Pakistan, P.L.D.1963 Lah.575.

remedy has to be adequate to the requisite relief, i.e; the removal, or lessening of the cause of distress or anxiety; the deliverance from that which was burdensome ..... If the relief available through the alternative remedy, in its nature and extent, is what is necessary to give the requisite relief, the 'adequacy' of the alternative remedy must further be judged with reference to a comparison of the speed, the expense or convenience of obtaining that relief through the alternative remedy, with the speed, expense or convenience of obtaining it under Article 98." The object of requiring that there should be no alternative remedy is to emphasize that the writ jurisdiction is not intended to become a substitute for the ordinary remedies available at law, and that, as such, the discretionary powers under Article 98 should be exercised only where exceptional circumstances exist, calling for the exercise of these extraordinary powers.(1) In Farid Ahmed's(2) case, Sardar Mohammad Iqbal J. said, "In all cases where a person is detained and he alleges that his detention is unconstitutional and in violation of the safeguards provided in the Constitution or that it does not fall within the

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(1) Khalique v. Pakistan, P.L.D. 1957 Dacca 437.

(2) Farid Ahmad v. Govt. of West Pakistan, P.L.D.1965 Lah.135.

statutory requirements of the law under which the detention is ordered, he can invoke the jurisdiction of this Court under Article 98 and ask to be released forthwith. It has to be observed that the right of the petition for Habeas Corpus is a high prerogative right and is a constitutional remedy for all matters of illegal confinement. This is one of the most fundamental rights known to the Constitution."

In another case,(1) where it was observed that, "In this application under Article 98 of the Constitution, the petitioner has primarily asked for the enforcement of his Fundamental Rights conferred on him by Chapter I, Part II of the Constitution and for that adequate relief can be granted to him by this Court alone." It follows that Habeas Corpus will not be refused because an alternative adequate remedy is available, if it is sought for the protection of a Fundamental Right.

In a very recent case(2) where the proceedings were commenced against the petitioner under West Pakistan Control of Goondas Ordinance, 1959, in a writ petition for habeas corpus, it was urged by the Additional Advocate-General that this writ petition was not maintainable, because the order

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(1) Nawabzada Nasrullah Khan v. The Dist.Magistrate, Lahore, P.L.D.1965 Lah.642.

(2) Abdul Sabur v. The Dist. Magistrate, P.L.D.1969 Pesh.167.

passed by the Tribunal, under Section 8 of the Ordinance, was appealable under section 18 and, since the detenus failed to exhaust their remedies, the writ petition was not maintainable. It was held that, when the liberty of person is involved, the question of adequate remedy does not come into play, in particular in cases of habeas corpus.

Conditions Precedent to Issue of Habeas Corpus.

The general rule is that, in order to make a case for habeas corpus, there must be an actual confinement or the present means of enforcing it. Mere moral restraint is not sufficient.(1)

Ordinarily the purpose of the writ is to enable the Court to inquire first, whether the petitioner or a friend of his is restrained of his liberty. If he is not, the Court can do nothing but discharge the writ. If there is such a restraint, the Court can then inquire into the cause of it, and if the alleged cause be unlawful, it must then discharge the prisoner. "The test as to the right to the writ is the existence of such imprisonment or detention, actual though it may not be, as deprives one of the privileges of going when and where he pleases. Actual physical restraint, like

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(1) Bailey, Habeas Corpus, 1913 Edition, Vol.I P.15, 16.

confinement in jail, is not necessary. Obviously, the extent and character of the restraint, which justifies issuance of the writ, must vary according to the nature of the control, which is asserted. Petitioner must be in such control or custody of the person against whom the petition is directed, that his body can be produced in Court. Therefore the writ will not lie where the party is permitted to go at large, without apparent restraint, as where the order of court read "that the defendant may depart without giving any recognizance, subject to the issuing of a new warrant, if ordered by this Court." The position is less clear when the petitioner is out on bail; or when an effort is being made to enforce a judgment ordering his commitment, and defendant is at liberty on bail, pending motion for a new trial, as he is constructively in the custody, not of the sheriff of the Court, but of his bondsmen."(1)

It was said(2) by Miller J. that,

"There is no very satisfactory definition to be found in the adjudged cases of the character of the restraint or imprisonment suffered by a party applying for the writ of habeas corpus, which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which

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(1) Ferris and Ferris, "Law of Extraordinary Legal Remedies," P. 32, 33.

(2) Wales v. Whitney, 114 U.S.564, 571.

it is used to give relief. Confinement under civil and criminal process may be so relieved: wives restrainted by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a workhouse, as well as those under military control, may all become proper subjects of relief by the writ of habeas corpus. Obviously, the extent and character of the restraint, which justifies the writ, must vary according to the nature of the control, which is asserted over the party in whose behalf the writ is prayed."

Something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it. In the above cited case a Court-martial was ordered to try a surgeon-general of the Navy, after he had vacated that office under charges and specifications of mis-conduct as chief of the bureau and surgeon-general. The Secretary of the Navy issued this order to him :-

"You are placed under arrest, and you will confine yourself to in the limits of the City of Washington." It was stated that it was evident that the petitioner was under no physical restraint. As a Naval Officer, the Secretary of the Navy could order him to remain at Washington, and he could not

leave without obtaining leave of absence. There was no more restraint of his personal liberty by the order of arrest than there was before. In the case of a military officer, who is more or less at all times subject in regard to his movements to the orders of his superior officer, it should be made clear that some unusual restraint upon his liberty of personal movement exists, to justify the issue of the writ. A distinction was made in case of an officer, with a writ in his hands for the arrest of a person, and that person submitted to arrest without force being applied. The officer had the authority to arrest and the power to enforce it. If the party named in the writ resisted or attempted to resist, the officer could summon bystanders to assist him and could himself use personal violence. Here the force is imminent and the party is in presence of it. It is a physical power which controls him, though not called into demonstrative action.

All statutory provisions concerning this writ contemplate a proceeding against some person, who has the immediate custody of the party detained, with the power to produce the body of such person before the Court, so that

he may be liberated, if no sufficient reason is shown to the contrary. In the case of a person at large, with no one controlling or watching him or detaining him, his body cannot be produced by the person to whom the writ is directed, except by consent of the alleged prisoner or by his capture and forcible production into the presence of the Court.(1)

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(1) Wales v. Whitney, 114 U.S.564.

PROCEDURE FOR WRIT OF HABEAS CORPUS

Application for the Writ of Habeas Corpus

The procedure for applying for the writ of habeas corpus is prescribed by the rules framed by the High Courts.(1) The application must be in writing, addressed to the Court or to a Bench of the Court or to a Judge of the Court, as may be prescribed under the rules. It must set out, concisely in numbered paragraphs, the facts upon which the applicant relies and the grounds on which the Court is asked to issue an order or direction and must conclude with a prayer, stating as clearly as circumstances permit, the exact nature of the relief sought. Each application for a writ of habeas corpus must be accompanied by an affidavit of the person restrained, stating that it is made at his instance and setting out the nature and circumstances of the restraint. Where the person restrained is unable, owing to the restraint, to make the affidavit, the application should be accompanied by an affidavit to the life effect, made by some other person, who should state the reason why the person restrained is unable to make the affidavit himself. The application must be

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(1) Chapter 4-F Lahore High Court Rules and Orders, Vol.V.

accompanied by an affidavit or affidavits in proof of any other facts referred to in the application. The Rules generally provide that the affidavits are to be restricted to matters which are within the deponent's own knowledge.

The Patna High Court observed(1)

"Affidavits filed on behalf of the detenus may generally be divided into three classes -

(i) those that consist of a mere denial of the grounds or facts alleged;

(ii) those that consist of an attempted explanation of the fact alleged, the truth of the explanation depending on credibility of evidence; and

(iii) those that disclose circumstances, which render the grounds, or the facts on which the grounds are founded, completely non-existent, that is, inaccurate on the face of them, without the necessity and independent of the question, of any evidence."

It is the last class of cases the High Court can interfere on the ground that the order is not bona fide. The first two classes of cases are those in which the Advisory Board is the proper authority to consider the denial or the explanation."

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(1) Madan Lal v. State of Bihar, A.I.R.1951 Pat. 153.

An application for writ of habeas corpus may be made during vacation also.

Under Article 98, there is no restriction as to the person who may make an application for an order of habeas corpus. An exception is made to the general rule that a petitioner must urge his own grievance, because a person may be incarcerated in circumstances making it impossible for him to communicate with the Court or his legal advisor.(1) In other words the person who applies and the person who is detained need not be identical and the restriction that the petitioner should be an aggrieved party is not applicable to an application of this writ.

The question as to who may apply and in what manner, is one to be regulated by the High Court by Rules framed under Article 101, but it seems that, until such Rules are framed, any-one may apply, even a stranger, though the relief being discretionary, the High Court may not make the order asked for, if the applicant has no interest whatsoever in the matter.(2) It has been held that it is not necessary that the detenu himself should apply;(3) a habeas corpus petition

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(1) Alan Gledhill, Pakistan, the Development of its Laws and Constitution. 1967. P.182.

(2) M. Munir, Constitution of The Islamic Republic of Pakistan, 1967. P.377

(3) Mohammad Anwar v. Govt.of West Pakistan, P.L.D.1963 Lah.109.

can be moved even by a friend of the person detained illegally.(1)

According to Halsbury,(2) "the person illegally imprisoned or detained in confinement without legal justification is, both at common law and by statute, entitled to apply for a writ of habeas corpus, but it is not essential that the application should proceed directly from him. Any person is entitled to institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment, and any person who is legally entitled to the custody of another may sue out the writ in order to regain such custody. In any case, where access is denied to a person alleged to be unjustifiably detained, so that there are no instructions from the prisoners, the application may be made by any relation or friend on an affidavit, setting forth the reasons for its being made. A stranger or volunteer, however, who has no authority to appear on behalf of a prisoner, or right to represent him will not be allowed to apply for habeas corpus."

On receiving an application for writ of habeas corpus,

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(1) Rao Mahroz Akhtar v. Dist.Magistrate, P.L.D.1957 Lah.676

(2) Halsbury, Laws of England, Vol.IX. P.721.

the Court will examine the application and may reject it, if it does not find sufficient reason to admit it. If it is of opinion that a prima facie case for granting the application is made out, a rule nisi or notice is issued, calling upon the person or persons against whom the order is sought, to appear on a day named therein, to show cause why such order should not be made and at the same time to produce in Court the body of the person or persons alleged to be illegally or improperly detained, then and there to be dealt with according to law. It is usual that such a rule nisi or a notice be accompanied by copies of the application and the affidavit, the copies being supplied by the applicant.

The High Court(1) has a discretion in the matter of directing the attendance of the detenu in Court. Generally the allegations made in a petition for habeas corpus are not conclusive by themselves and the practice is to issue an order to the respondent to show cause why the petition should not be granted. A rule nisi for production of the detenu in Court would be made only where a prima facie case of unlawful detention has been made out on behalf of the person invoking the aid of the Court. Where the order of detention produced

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(1) Abdul Karim v. Govt. of Hyderabad, A.I.R.1951 Hyd.83.

by the Government appears to be on the face of it a proper order and there is no defect or irregularity about the same, it cannot be said that the detenu has made out a prima facie case for the issue of an order directing his production in Court. On the day for return of such rule or notice or any day to which the hearing thereof may be adjourned, if no cause for detention is shown or if cause is shown and disallowed, the Court will pass an order that the person or persons improperly detained shall be set at liberty. If cause is shown, the rule or notice will be discharged. After an order for the writ to issue has been granted, the Court official, authorised under the Rules, must draw up the order in the prescribed form. The order for the release made by the Court, or the Judge, is a sufficient warrant to any gaoler, public official, or other person for the release of the person under restraint. All questions arising for determination in these applications are decided ordinarily upon affidavits, but the Court may direct such questions as it may consider necessary to be decided on such other evidence and in such manner as it may deem fit and, in that case, it may follow such procedure and pass such orders as may appear to it be just.

According to Halsbury,(1) "If it be impossible for the

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(1) Halsbury, Laws of England, Vol.IX Para.1252 Page 734.

person to whom the writ is directed to produce the body of the person alleged to be in his custody by reason of his having parted with the custody of such person before the service of the writ, he must nevertheless make a return setting out the facts unequivocably and distinctly and showing the reason why he is unable to obey the writ. Such a return will constitute a good and sufficient return; the object of the writ is not punitive but remedial; the fact that a prisoner, whose production has been ordered, has been discharged from custody before the return should be stated on the return and in such event the cause of taking and the detainer need not appear on the return."

Under the English law, obedience to the writ is enforced by attachment. "The appropriate mode of enforcing obedience to a writ of habeas corpus is by attachment. When a writ is disregarded and no return is made thereto, the party to whom the writ is directed, even if he is a peer, will be liable to attachment. If a writ of habeas corpus be disobeyed by the person to whom it is directed, application may be made to the Court for an attachment for contempt, or an application may be made to a judge in Chambers, for a warrant for the apprehension of the person in contempt to be brought before him, or some other judge, to be bound over to appear in Court

to answer for his contempt or to be committed to prison for want of bail. An application for an attachment for contempt must be made on an affidavit of service and disobedience, proof of personal service of the original writ of habeas corpus being essential, before attachment for disobedience will be granted.

The application to a judge in Chambers for a warrant can be made during vacation or when there is no divisional Court available, and in such event, takes the place of an application to the Court for attachment. Attachment may be granted against a person, who intentionally makes a false return to a writ of habeas corpus, but an unintentional misrepresentation upon a return is not a good ground for attachment. An insufficient return constitutes a contempt and the party knowingly making it is liable to attachment."(1)

In Pakistan, obedience to writ is enforced by proceedings for contempt of Court under Article 123 of the 1962 Constitution. The respect due to a Court itself is owed also to its process. It amounts to contempt of Court, when a person served with process shows a disrespect for the process of the Court by using indecent expressions or violent language on being served

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(1) Halsbury "Laws of England." Vol. IX. Para.1260.

with such a process or assaulting or ill-treating the process-server and deliberately disobeying the order of the Court. Failure or inexcusable delay on the part of any person, including any high government official, to obey the orders of the Court is punishable for contempt under clause (2)(a) of Article 123.

Disobedience to the Court's order for the release or production before it of a person alleged to be illegally detained is considered to be contempt of Court.

The Supreme Court of Pakistan has held[1] that, "A police officer was liable for gross contempt by his refusal to obey the High Court's order and by resisting the bailiff in the exercise of the Court's power in habeas corpus.

Similarly, the continuation of the detention after the order for release, on the basis of the fresh order for detention which is mala fide would also amount to contempt of Court.[2]

Re-arrest after discharge :-

Where a person has been discharged and the Court, in ordering his discharge, has, in the exercise of its jurisdiction, held that the grounds of his detention were

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(1) Abdul Hamid v. State, P.L.D.1964 S.C.186 (189).

(2) Subodh Singh v. Province of Bihar, A.I.R.1949 Pat.247.

not proper grounds under the law, he cannot be re-arrested and kept under detention on the same grounds. Where the Court has declared the detention of a person to be without justification upon the merits, a fresh order of detention made, in order to circumvent the decision, would be mala fide and a detention under such fresh order would be illegal.(1) But where the sufficiency of the grounds is not subject to examination by the Courts, there is nothing inherently illegal about successive orders passed against a person on the same ground.(2) Thus where the Court has proceeded on the ground that the law under which the order had been made was invalid or the order was irregular in form, a fresh order of detention under another law or in regular form would not necessarily be mala fide.(3) In a case(4) under Section 491 of Cr. P.C., it was held that the High Court has to consider the legality or otherwise of the detention of a particular person in public or private custody. The legality has to be considered, not with reference to a particular order only. If there are more

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(1) In re A.K. Gopalan. A.I.R. 1953 Mad.41

(2) Ibid.

(3) Bhupendra De v. The Chief Sec. Govt. of West Bengal, A.I.R. 1949 Cal. 633

(4) Subodh Singh v. Province of Bihar, A.I.R.1949 Pat.247

orders than one against a particular person on the date on which the question of his detention is under consideration, it is certainly the duty of the detaining authority to produce the orders of detention in support of, or in justification of the detention. Where, therefore, the legality of the detention of a person under the first order of detention is under consideration and the detaining authority has a second order of detention against the same person, it is not open to the detaining authority to keep the second order of detention up its sleeve, to allow an order of release to be passed on the first order of detention and then produce the second order of detention for the purpose of detaining the man after the order of release has been passed. To allow or encourage such a practice would be tantamount to stultifying the order of the High Court. So if the person is re-arrested under a second order of detention, such arrest and detention would be invalid. The order or release on the habeas corpus application would automatically discharge the fresh order of detention passed before the Court pronounced its judgment but not brought to its notice. These observations relate only to an order of detention passed before the order of release and which the detaining authority had an opportunity of producing in support

of the detention. These observations would not apply to a case where an order of detention is passed subsequent to the order of release on fresh or different grounds.

Successive Applications

In an appeal,(1) it was contended on behalf of the applicant that, by the common law of England, which applied in Nigeria, 'it is the right of any imprisoned person to apply successively to every tribunal competent to issue a writ of habeas corpus, and that each tribunal must determine such an application upon its merits, unfettered by the decision of any other tribunal of Co-ordinate jurisdiction, even if the grounds urged are exactly the same.' It was held that "Each Judge of the High court of Justice has jurisdiction to entertain an application for a writ of habeas corpus, in term-time or in vacation, and he is bound to hear such application on its merits, notwithstanding that some other judge has already refused a similar application. The same principle applies in the case of the Judges of the Supreme Court of Nigeria, to which the Common law of this country is applicable.

In Pakistan the rule is different; the Court always

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(1) Eshugbayi v. Govt. of Nigeria, 1931 A.C.662.

finds itself in an embarrassing position, when a petition by a stranger has been dismissed and is followed by one from the detenu himself or someone interested in him, who is more conversant with the facts. Under our constitution the repetition of the application on the same grounds is not permissible, though in England, until recently application might be made to each judge in succession.
Under our constitution, it is suggested,(1) there can be no scope for such successive applications, for the reason that the power is the power of the High Court and not of individual Judges, and once it is exercised, one way or the other, the Court is functus officio, except for purposes of review, if review be competent, and the only remedy to the aggrieved party is a petition for leave to appeal under Article 58(3).(2)

The Allahabad High Court has held,(3) that, where an application under section 491 was dismissed by a judge of the High Court, a second application to the same effect and with the same object, was expressly prohibited and was not maintainable.

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(1) Munir, Constitution of the Islamic Republic of Pakistan, Ed. 1967 P.378.

(2) Kishori v. The Crown, A.I.R. (1945) 26 Lah. 573

Mirza Mohammad Yaqub v. The Chief Settlement Commissioner, Lah., P.L.D.1965 S.C.254

(3) (Mst.) Haidri Begum v. Jawad Ali Shah, A.I.R.1934 All.22.

The Patna High Court(1) held that it is not open to a detenu to ask for a review of an order already made under section 491 of Cr. P.C., that successive applications on the same facts cannot be made for a writ of habeas corpus, that entertaining a second application on the same facts would amount to review of the earlier judgment and would be clearly barred by section 369.

However it has been recently held by a Full Bench of the Lahore High Court (2) that an application for habeas corpus on fresh grounds can never be barred. It can be visualised that a rejection of a former petition of this nature may not in every case operate as res judicata or have finality. Even in a case in which the Court has determined that, on the day of the order, the person in custody was being lawfully detained, a subsequent petition, if directed against his continued detention, on a date subsequent to the order of the Court, need not involve a review of the earlier order of the Court, dismissing the earlier petition, and it may not violate the principle of finality of judgment of theCourt. If the detention is shown to be either unlawful or in an

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(1) Raghunadan Yadav v. Province of Bihar, A.I.R.1949 Pat.262

(2) Nasim Fatima v. Govt. of West Pakistan, P.L.D.1967 Lah.103 (F.B)

unlawful manner, it is the duty of the Court to release the person in detention, and it is no answer to the petition that an earlier petition has been dismissed. It has further been held that, the purpose of the Constitution will be defeated, if a second application is not entertained on the technical ground that a former petition has been dismissed. One cannot visualise a technicality standing in the way of setting at liberty a person who is being detained without lawful authority or in an unlawful manner. If the question is to be decided on general principles of public policy, then obviously the Courts must lean in favour of granting the relief, rather than refusing it, unless there is a prohibition in the rules or the statute, but there is no prohibition of successive application in the rules or the statute. The wording of the Constitutional provision enables a challenge to an order of Detention and the Court is authorised to satisfy itself that the person in custody is not detained without lawful authority. This duty the Court must perform. The Court is not relieved of this duty, because a certain ground, or a question of law or fact or a certain reasoning, which could have shown by the order of detention to be unlawful, was not raised or taken before the Court in an earlier petition."

A writ or direction in the nature of habeas corpus can be issued in a case in which the movements of a person have been restricted to a specified area, provided that the deprivation of liberty involved cannot be legally justified.(1)

A person may be released from custody by a writ of habeas corpus, if he has been committed for extradition, where the offence is not extraditable, e.g., where it is a political offence,(2) or is not covered by the Extradition Treaty,(3) but if there be evidence that the offence alleged to have been committed is extraditable, no writ can be granted on the ground that extradition is being asked for to take action against him for political activities.(4)

Natural Justice.

Orders and proceedings in violation of the principles of natural justice are liable to be quashed in the exercise of the jurisdiction under Article 98 of the Constitution. In one case,(5) it was pointed out that the principles of natural justice are :-

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(1) Rao Mahroz Akhtar v. Dist.Magistrate, P.L.D.1957 Lah.676
P.L.D.1963 Lah.109

(2) Re: Castioni, (1891) 1 Q.B. 149.

(3) In re: Wilson, (1877) 3 Q.B.D. 42

(4) Adhibandu v. Emperor, A.I.R.1946 Pat.196

(5) Safi-ud-Din v. Secy. Social Welfare & Local Bodies Department, P.L.D.1958 Pesh. 157.

(1) that every person whose civil rights are affected must have a reasonable notice of the case he has to meet

(2) that he must have reasonable opportunity of being heard in his defence

(3) that the hearing must be by an impartial Tribunal, i.e., a person who is neither directly a party to the case, or who has an interest in the litigation, or is already biased against the party concerned

(4) that the authority must act in good faith and not arbitrarily, capriciously or maliciously. If the discretionary power conferred on an executive is exercised arbitrarily, capriciously or unreasonably, or by taking into account extraneous and irrelevant consideration, the authority concerned must be deemed not to have exercised the discretion at all, that is, he has not discharged his duty.

When the law confers a certain power on a certain authority, then it is that authority which has got to exercise it, according to the established principles of fair-play and natural justice. If it is shown that the power has been exercised by such an authority not independently, but under instructions of some superior officer, then the exercise of such authority would in the eye of law be a nullity. It

would be more so, if the superior authority happens to be authority to whom the case has ultimately to be submitted for confirmation. When the law enjoins that a certain order should not take effect, until it is confirmed, by another authority, then the law requires that the authority passing the order and the one confirming it should act independently of each other, and not in collaboration, and if that is not done, then it clearly amounts to violation of the principles of natural justice.(1)

In a case before Supreme Court of Pakistan, Shahab-ud-Din, J. observed,(2)

"It cannot be disputed that it is a principle of natural justice that no one should be dealt with to his material disadvantage or deprived of his liberty or property without having an opportunity of being heard and making his defence. That being so, when a statute gives a right of appeal, it should be understood as silently implying, when it does not expressly provide, that the appellant shall have the right of being heard. As argued by the learned Advocate for the respondent, and indicated by the learned Judges of the High

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(1) Muhammad Ayub Dar v. Deputy Commissioner, P.L.D.1957 Pesh. 63

(2) Chief Commissioner v. Dina Sohrab Katrak, P.L.D.1959 S.C.45

Court, the above rule of Justice is not confined to proceedings before Courts but extends to all proceedings, by whomsoever held, which may affect the person or property or other right of the parties concerned in the dispute. As a just decision in such controversies is possible only if the parties are given opportunity of being heard, there can be, as regards the right of hearing, no difference between proceedings which are strictly judicial and those which are in the nature of a "judicial proceeding though administrative in form."

In Mehrab Khan's[1] case, it was observed, "A personal hearing before deciding a matter is not a necessary requirement of the principle of natural justice. All that is necessary is a full and fair opportunity of making a representation or showing cause. What is full and fair opportunity depends upon the facts of each case."

In an emergency, when grave danger to the public safety or maintenance of public order is involved, it might be necessary for the authorities to take immediate action. In

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(1) Mehrab Khan v. Taj Mohammad, P.L.D.1961 Quetta 1.

such case, prior hearing may not be feasible. In such a situation, it is sufficient if opportunity is afforded therefor subsequently. This point was dealt with in the case of Maudoodi[1] by their Lordships of the Supreme Court and the following observations were made by Cornelius, C.J :- "It is noted by Willoughby that it is fundamental to the idea of due process to give notice in advance and an opportunity to be heard to the person affected, who may present such pertinent facts and arguments as he may desire in opposition to actions that may adversely affect him or his proprietary interests. But where, because of the urgency of the public need or for practical reasons of administrative efficiency, such prior notice and hearing is not feasible, the Courts of the United States have held that the requirements of due process are satisfied, if the like opportunity is later given to the person affected. Instances of this kind are to be found in the laws of Pakistan, in particular those relating to public order and public safety. The provisions of section 144, of Criminal Procedure Code furnish an excellent example. The judgment delivered in the High Court of East Pakistan mentions an Indian case, that of Babulal Parate v. The State[2], where the provisions of this section were

(1) Abul A'la Maudoodi v. Govt.of West Pakistan, P.L.D.1964 S.C.673

(2) Babulal Parate v. The State, A.I.R. 1961 S.C.884

challenged as being in violation of certain Fundamental rights and, after full analysis and examination, it was held that the 'restrictions' which could be imposed under the section were 'reasonable.' Stress was laid on the following elements, viz. 1) the restraints were ordinarily to be laid after notice, and it was only in emergency that the order could be made ex parte, 2) though action was based on formation of an opinion yet that opinion is in respect of factual matters, i.e., to prevent obstruction, annoyance, etc. to persons lawfully employed or to prevent danger to human life, health or safety, or disturbance of public tranquillity or a riot or affray, so that the opinion is not purely subjective, 3) an order under section 144, Cr. P.C. is of a temporary nature, 4) the order must state the material facts by which it is justified, 5) the person affected is entitled to represent against the order, and is to be heard in person or by pleader, and if the representation is rejected, reasons must be given, and 6) there is further judicial review available in the form of a revision before the High Court.

In the Constitution itself, the power of preventive detention is recognized, but is made subject to a time-limit, and also to the requirements that extension shall only be made after reference to an advisory board with the additional

requirements that the grounds of the detention shall be communicated to the persons detained and he shall be afforded the earliest opportunity of making a representation against the order.

Therefore, there need be no hesitation in holding it to be within the spirit of the Constitution, as well as of the relevant laws of Pakistan, that where grave danger to the public safety or public order is involved, reasonable restrictions upon the freedoms guaranteed by the Constitution are ensured in respect of peremptory executive actions to avert the danger, if opportunity is provided as soon thereafter as may be convenient, for exercise by the person of the right to represant that the restraint was not justified in relation to the factual requirements of the law applied, or that in other way the restrictions lacked the elements of reasonableness."

Kaikaus, J., in the same case observed :-

"I am prepared to concede that whenever an emergency requires the passing of an order without hearing the party concerned, an order may be passed and to this extent there has to be a proviso to the maxim audi alteram partem, but action can be taken ex -parte only to the extent to which

it is absolutely necessary. The ex-parte order is in such cases to be regarded only as an interim order or a provisional order, which will remain in force till a final order is passed after hearing the party concerned."

"Without lawful authority" and "In an unlawful manner."

Under Article 98 (2)b, it is the duty of the Court, on the application of the aggrieved party, to satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner.

The Supreme Court of Pakistan has held (1) that, "It is agreed that expression "without lawful authority" and "in an unlawful manner" occurring in sub-clause (b) were not merely tautologous. A definite meaning had, therefore to be given to each of them. The Constitution, it appears, casts a heavy responsibility upon the Court to satisfy itself with regard to both these two matters. The question therefore arises as to what these matters mean. It is agreed that 'without lawful authority' will include all questions of vires of the statute itself, as also of the authority of the person or persons acting under the statute, i.e; there must be a constitutionally valid law authorising

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(1) Govt. of West Pakistan v. Begum Agha Shorish Kashmari, P.L.D.1969 S.C.14

the detention and the officer issuing such an order must have been lawfully vested with the power. But what is it that falls within the expression 'Unlawful manner?'

It has been held "that 'in an unlawful manner' in sub-clause (b) of the Article 98 (2) has been used deliberately to given meaning and content to the solemn declaration under Article 2 of the Constitution itself, that it is the inalienable right of every citizen to be treated in accordance with law .... therefore, in determining how and in what circumstances a detention would be detention in an unlawful manner, one would inevitably have first to see whether the action is in accordance with law; if not, it is action in an unlawful manner ..... An action which is mala fide or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. Action taken upon no ground at all or without proper application of the mind of the detaining authority would also not qualify as action in accordance with law and would therefore, have to be struck down as being action taken in an unlawful manner."

Review

There is no provision in the Constitution of 1962 which enables the High Court to review its own orders or judgment, passed in exercise of the writ jurisdiction. The Supreme Court of Pakistan however possesses this power. The reason for this is obvious; while against the order of Supreme Court itself no appeal lies, therefore the Supreme Court is to correct its own judgment; in case of the High Court its judgment could be corrected by the Supreme Court in appeal.

So it has been held that, "Unless a statute provides a remedy by way of review the Court cannot review its own judgment, except in very exceptional circumstances, such as for example, where it passed an order inadvertently or on account of some false representation by the officer of the Court."(1)

"It has been made clear by Article 130 that no Court shall have any jurisdiction that is not conferred on it by the Constitution or, by or under any law. Arguments based on the existence of inherent jurisdiction, apart from that conferred by the Statute, are therefore, no longer available. In any case, an order made in exercise of a judicial power carries with it the incidents of finality, so far as that

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(1) M.J.Kutinah v. Mrs. Nathal Pinto, A.I.R.1941 Mad.272

form is concerned, whenever rights accrue under that order. Unless it is provided that an order once made may be reviewed, it would not normally be capable of being reviewed."(1)

Appeal

An appeal may lie to the Supreme Court under Article 58, where a substantial question of law as to the interpretation of the Constitution is involved, or where the Supreme Court grants special leave for appeal, in a habeas corpus matter, from the orders of a High Court.(2)

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(1) Jalal Din v. Muhammad Akram Khan, P.L.D. 1963 (W.P.) Lah.596. (Per Manzur Qadir, C.J.)

(2) In re Parhald Krishna, A.I.R. 1951 Bom.25.

CHAPTER IX

STATUTORY REMEDIES.

Statutory Habeas Corpus

Under Section 491 of Criminal Procedure Code, High Courts have power to issue directions of the nature of Habeas Corpus. The relevant section reads as follows :-

1. Any High Court may, whenever it thinks fit direct:-
   (a) that a person within the limits of its appellate Criminal jurisdiction be brought before the Court to be dealt with according to law;
   (b) that a person illegally or improperly detained in public or private custody within such limit be set at liberty;
   (c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;
   (d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners for the trial to be examined touching any matter pending before such Court-martial or Commissioners respectively;

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and

(f) that the body of a defendant within such limits be brought in on the Sheriff's return of Cepi Corpus to a writ of attachment.

2. The High Court may, from time to time, frame rules or regulate the procedure in cases under this section.

3. Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818, or Bombay Regulation XXV of 1827, or the State Prisoner Act, 1850, or the State Prisoner Act, 1858, or the Security of Pakistan Act, 1952.

Custody

The essence of custody is that there should be a lack of freedom to move about where and when one pleases, coupled with a physical power immediately available to prevent an attempt at breaking the restrictions imposed, as distinguished from the power subsequently to punish for a breach of these restrictions. If a person has been ordered that he must not go beyond certain boundaries, but there is no physical impedient or threat of physical force to ensure that he does not go outside those boundaries, there would be no

confinement and no custody, even though that person may be liable to be punished in due course of law, if he did go out. On the other hand, if he was told that he must not go beyond those boundaries and is told that if he did, physical force would be available to prevent him from doing so, there would then be no difference of kind between his confinement or custody and that of a person confined in jail, though there would, of course, be a difference of degree.(1)

Therefore in such a case an application under section 491 would be maintainable. In one case(2) restrictions imposed under the W. P. Maintenance of Public Order Ordinance, 1960, were held to amount to the person being in custody and as such the provisions of section 491, Cr. P.C., were held to be attracted.

Successive Orders of Detention

When an order is for continuing the detention of the detenu, it does not necessarily mean that an illegal detention was being continued by a fresh order of detention, and what is to be seen is whether the last order of detention were legal and if, at any time before the Court directs the

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(1) Muhammad Anwar v. Govt. of West Pakistan, P.L.D.1963 Lah. 109 (F.B)

(2) Ibid

release of detenu, a valid order directing his detention is produced, the Court cannot direct his release, merely on the ground that at some prior stage there was no valid cause for detention; the question is not whether the later order invalidated the earlier detention but whether in the face of the later valid order, the Court can direct the release of the detenu.(1)

Review

An application for review of an order made under section 491 of the Code of Criminal Procedure is barred under section 369 of the Code.

Cases where Habeas Corpus Directions under Section 491 of Criminal Procedure Code were issued

1. In Rehmat Ullah's case(2) where the petitioner had been detained under section 89 of Bahawalpur State Public Safety Act, 1944, it was argued by the Crown Counsel that, in the presence of section 89 of the Act in question, the jurisdiction of the High Court was barred to entertain the petition of Ch. Rehmat Ullah, under section 491 of Code of Criminal Procedure.

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(1) Mohi-ud-Din v. Govt.of East Pakistan, P.L.D.1965 Dacca 514 (D.B)

(2) Rehmat Ullah v. Crown, P.L.D.1951 Bughdad-ul-Jadid 64

It was held, "The power of the High Court under section 491 of Criminal Procedure Code is abridged to a certain extent in the presence of Section 89 of the Bahawalput State Public Safety Act, 1944 but is not taken away in its entirety. The High Court is therefore, competent to call upon the Crown, under its residuary power, to produce all relevant papers before the Court." The Crown failed to prove that the detention of the petitioner was in conformity with the law and the detention was held illegal.

2. In Hamesh Gul's case,(1) the petitioner Hamesh Gul and his brother questioned the legality of the order of the Deputy Commissioner, Peshwar, purporting to have been made by him under Section 12, of the Frontier Crimes Regulation III of 1901, by a petition under section 491 of Criminal Procedure Code. The order deprived Hamesh Gul and his brother of his liberty for a period of seven years.

The Learned Advocate General, at the very outset, argued that the Court could not go behind the orders passed by the Deputy Commissioner under Frontier Crimes Regulation because of two reasons namely :-

(a) the jurisdiction to do so is expressly barred by section 60 of Frontier Crimes Regulation and

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(1) Hamesh Gul v. Crown, P.L.D. 1955 Pesh. 1.

(b) the detenu was convicted and sentenced to a certain term of imprisonment by a tribunal of competent jurisdiction, against which the detenu had the remedy to apply for revision to the Commissioner under section 49 and 50 of Frontier Crimes Regulation.

On the question whether the High Court could act in the matter of issuing habeas corpus under section 491 of the Criminal Procedure Code, it was held that,

"In the case of the persons whose liberty has been taken away by the executive authorities, the High Court have got to be liberal, firstly because the executive authorities in some cases, quite honestly, have a tendency to transgress the law and secondly, because either there is no remedy provided to the condemned person under the law under which he is dealt with or the remedy is not so effective. In such cases, if the High Court finds that a fundamental right has been infringed, or the authority concerned has not followed the procedure laid down in the law, or the forms of law have not been satisfied or strictly complied with, or the authority has permitted itself to be influenced by considerations foreign, extraneous and repugnant to the relevant law, they will step in and put the wrong done by the executive authority right."

It was pointed out that their Lordships of the Federal Court had held[1], that, "imprisonment under the Frontier Crimes Regulation is ordered under the executive or administrative order and is not an imprisonment by a court of law."

The order of the Deputy Commissioner was held to be mala fide and without jurisdiction and bad in law. The petitioners were set at liberty.

3. In Ghulam Qadir's case[2], the petitioner was a prisoner, who had been released by mistake before he had served his sentence and was rearrested, after the time for serving his sentence had elapsed; it was held that, "There is nothing in any law which provides for the rearrest of a prisoner, who has inadvertently been released, with object of compelling him to complete the unexpired portion of his sentence after the expiry of the date on which he should normally have been released."

The rearrest was held to be illegal; the petitioner was set at liberty, as he could not be expected to suffer, as a result of an error made by the jail authorities.

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(1) Samundar v. The Crown, P.L.D.1954, F.C.228

(2) Ghulam Qadir v. Crown, P.L.D.1954 Baluchistan 42.

4. In Anwar Babri's case[1], a petition was filed on behalf of Khan Abdus Satter Khan Niazi for release from illegal and improper detention under Bengal State Prisoners Regulation 1818. In this case, opposing the petition, it was contended by the Assistant Advocate General that the jurisdiction of the High Court was barred by sub-section (3) of section 491, Code of Criminal Procedure which reads as follows:-

'Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation 1818 .... '
It was observed that, "We did not accept such contention to be raised in view of the volume of authority which exists in favour of the view that, in order to exclude the jurisdiction of the Court by reason of such provisions, it must be shown that the order was made under the Act or Regulation. Emperor v. Vimalabai Desphande[2] provides one illustration. The Privy Council pointed out that, "If the orders made by the Government were invalid, they were not made in exercise of powers conferred by or under the Act. "It is not enough that a warrant should purport to have been issued under the Regulation, in order to exclude the jurisdiction of High

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(1) Muhammad Anwar Babri v. Crown, P.L.D.1955 Lah.585 D.B.

(2) A.I.R. 1946 P.C.123

Court. It must be truly a warrant, which is authorised by the Regulation. Section 3 was not a bar to the High Court's ascertaining whether detention was, in fact, ordered under the Bengal Regulation." "Whether a detention was or was not under the Regulation is a matter of substance and is not concluded by the circumstances that the Regulation is mentioned in the warrant."

The warrant in this case was not a warrant under the Regulation; the detention was held illegal and the detenu was set at liberty.

5. In Anwar's case(1), Lal Khan was served with an order under Section 5 of the West Pakistan Maintenance of Public Order Ordinance, 1960, to remain within the revenue limits of village Bhatial, Police Station Sadar Jhelum for a period of six months. A petition was moved by one of his friends, M. Anwar; it alleged that the order against Lal Khan amounted to one of detention and prayed for order of habeas corpus. It was held that, "what should be deemed to be detention for the purposes of the Section 491 of the Criminal Procedure Code has not been defined either in the section itself or the code and it would be for the Court to determine

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(1) Muhammad Anwar v. Govt. of West Pakistan, P.L.D. 1963 Lah. 109.

what restraint on liberty of a person would amount to detention, for ending which the power of the Court could be exercised under section 491 of the Criminal Procedure Code." In the instant case such restrictions on the movements amounts to the person being in custody of the Government and hence under detention for the purpose of the section 491 of Criminal Procedure Code. The Government in this case failed to comply with the requirements of the ordinance, in that it did not inform the person of the ground of his detention; hence the order was held to be without lawful authority and of no legal effect.

Cases where prayer under Section 491 of the Criminal Procedure Code was refused.

1. In Ajab Khan's case[1], it was held that, "The Court has no jurisdiction to entertain the habeas corpus petition arising out of proceedings under Section 40, of Frontier Crimes Regulation, unless it is established from the record that the Deputy Commissioner had no power to initiate the proceedings under section 40 of Frontier Crimes Regulation. It is a well established principle of law

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(1) Ajab Khan v. State, P.L.D.1963 Pesh.224 D.B.

that, in a petition under section 491 of Criminal Procedure Code, the order passed by the Deputy Commissioner can be successfully assailed, only when it is shown that Deputy Commissioner had no jurisdiction to initiate proceedings, and, once it is shown that he had such jurisdiction, our jurisdiction to call in question such proceedings come to an end." In support of this view the court relied on what Cornelius Chief Justice had said,(1)

"In these circumstances, it should be obvious that for the Superior Courts to interfere, whether by approval or otherwise, with the operation of the system in any case, once the case is competently drawn into system, would be a violation of the legislative intention. All action, in the writ jurisdiction, should be confined to action in limine, that is to say, in assertion of the jurisdiction of the ordinary Courts and in vindication of the law, to scrutinise the process by which the case, if there be one, has been or sought to be, diverted into the ambit of the jirga system. If the legal requisites are satisfied, there is the last contact which the superior courts can retain with case, viz; by making such a declaration. All other processes

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(1) Muhammad Akram v. The State, P.L.D. 1963 S.C.373.

taken in the disposal of the case within the jirga system are outside the purview of the Courts, in any of their jurisdiction."

In this case the Deputy Commissioner's order was held to be with jurisdiction to issue the orders and the habeas corpus petition was dismissed.

2. In Umar's case[1] the petitioner was ordered under Section 5 of the Punjab Safety Act, to reside and remain within the corporation limits of Lahore city. The sole question for determination was whether an application in the nature of a habeas corpus as contemplated by section 491 of Criminal Procedure Code lies in respect of the order. It was held,

"Section 491 (1)(b) of the Code of Criminal Procedure, which provides a remedy for illegal detention, cannot be invoked in cases of restriction orders under Section 5 of the Punjab Public Safety Act, 1949, in as much as there can be no question of setting such a person at liberty and also section 33 of the Punjab Public Safety Act explicitly provides, "No proceeding or order taken or made under the Act shall be called in question in any Court." The petition was dismissed.

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(1) Maulvi Mohammad Umar v. Crown, P.L.D.1955 Lah.179.

3. In Kartar Singh's case[1] it was held that, "Where a person has been convicted and sentenced by the Court martial, whether there is evidence to sustain a conviction is a question of law and the members of a Court martial are the sole judge of both law and fact. The High Court, under section 491 of Criminal Procedure Code, cannot interfere, if they make a mistake of law and convicting on no real evidence would be a pure mistake of law. It would be different, if the Court martial convicts an accused person without hearing any evidence. The High Court can then hold that the detention of such a man was illegal, because the proceeding of the Court martial would be irregular on the face of them."

4. In Qadir's case[2] the habeas corpus petition was filed under section 491 of Criminal Procedure Code, challenging the propriety and legality of the arrest and detention of three accused persons. It was observed by the court that, "The detention at the first instance was illegal, but it was subsequently legalised by a competent court. As such, the petition becomes infructuous and calls for no order."

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(1) Kartar Singh v. Imperator, A.I.R.1946 Lah.103 (D.B.)

(2) Qadir v. The State, P.L.D.1958 Pesh. 38 D.B.

5. In Bismilla's case[1], action under section 40 of Frontier Crimes Regulation by the Deputy Commissioner was challenged by a petition under section 491 of the Criminal Procedure Code. It was held that,

"The Deputy Commissioner is the sole judge to decide whether there is any case made out by the prosecution to bind a certain person down under section 40 of Frontier Crimes Regulation. The High Court cannot interfere, even if the Deputy Commissioner has made a mistake, either of law or fact, in arriving at any particular decision. Assuming for the sake of argument that this court had jurisdiction, section 60 of the Frontier Crimes Regulation has taken it away." The point involved in this case was discussed at some length by their Lordships of this court in a case[2] where they observed, "We have no power to go into the question whether the order referring the case of the petitioner for trial to a jirga is justified on the facts of the case or not. Section 60, Frontier Crime Regulation, provides that, except as provided in the

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(1) S. Bismilla Shah v. N.W.F.P. Govt., P.L.D.1950 Pesh. 52.

(2) Khanim Ullah v. Crown, 1947 Peshwar Law Journal 19.

Regulation, no decision, decree or order given, passed or made, or act done, under Chapter III, IV, or VI shall be called in question, or set aside by any Civil or Criminal Court. The order in question was passed under Chapter III and it cannot be called in question in any criminal court, except as provided by the Regulation, unless it can be shown that it was without jurisdiction. As we have held that the Deputy Commissioner had jurisdiction to pass the order in question, it cannot be called in question in this court. The Commissioner alone has the power under Section 49, Frontier Crimes Regulation to revise such orders. In these circumstances we cannot hold that the detention of the petitioner is illegal. No action is therefore, called for under section 491 of the Criminal Procedure Code. The petition shall therefore be dismissed."

Comparison between Constitutional and Statutory Habeas Corpus

Article 98 (2)(b)(i) is not a reproduction of section 491 of the Code of Criminal Procedure, but enacts in other words clause (a) and (b) of sub-section (i) of section 491 of that Code. This is a Constitutional provision and has to be liberally construed. It is intended to preserve the liberty of the subject and is a safeguard against unlawful or improper manner of detention. It should be so construed as to advance the remedy and supress the mischief, in accordance with well recognised principles of construction.(1) The constitutional provision is of higher authority and is not subject to the restriction imposed by sub-section (3) of section 491 of Cr. P. C. in respect of persons detained under the Bengal State Prisoners Regulation, 1818, or the Bombay Regulation XXV of 1827, or the State Prisoners Act, 1850, or the State Prisoners Act, 1858; nor do the provisions of any other special law, e.g. West Pakistan Maintenance of Public Order Ordinance, 1960 authorising detention and

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(1) Nasim Fatima v. Govt. of West Pakistan, P.L.D.1967 Lah.103 F.B.

restricting the High Court's power, control this special jurisdiction.(1) The constitutional provision does not say, as section 491(1)(b) of the Code of Criminal Procedure does, that if the High Court be not satisfied that the person concerned is being held under lawful authority or in a lawful manner, it may order him to be set at liberty. But that such an order may be made cannot be doubted. The provision confers on the High Courts a jurisdiction which corresponds broadly to that possessed by the High Court in England to issue the prerogative writ of habeas corpus ad subjiciendum to safeguard the liberty of the subject.(2)

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(1) Muhammad Ali v. Muhammad Bashir, P.L.D.1962 Lah.230

(2) Munir, Constitution of the Islamic Republic of Pakistan, (1967) P.. 376.

Article 2 of Constitution of Pakistan, 1962.

1. To enjoy the protection of law and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

2. In particular -

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;

(b) no person shall be prevented from, or be hindered in, doing that which is not prohibited by law; and

(c) no person shall be compelled to do that which the law does not require him to do.

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Article 2 furnishes a basis for review of all executive actions under Article 98. Apart from the declaration of fundamental rights, it confers on the citizen and on every other person who is for the time being in Pakistan a right to be treated in accordance with law in matters involving his life, liberty, body, reputation or property and it also guarantees that no person shall be prevented or hindered

from doing what is not prohibited by law and nobody can compel him to do what he is not required to do by law.

Article 2 is original, as its equivalent is not to be found in the American, Indian or 1956 Constitution. According to M. Munir[1] (formerly Chief Justice of Pakistan), if the Article creates any right, it is obvious that their infringement and contravention may be complained against. But it is difficult to see how the aid of the Article can be invoked in a case, where no public or private right is involved. What the Article declares is that any public functionary or person, taking any action affecting the life, liberty, property or reputation of a person, or affecting his profession, trade or business, must rely on some law to justify his action. Thus, a hangman must be equipped with legal authority to hang, a jailer or a whipper with a legal warrant to imprison or whip, an officer or other person seizing another person's property with a legal warrant to seize or confiscate, and a person who interferes with another person's right to carry on his trade, profession or business, with legal power to regulate or stop such activity. Similarly a person requiring

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(1) Munir, Constitution of the Islamic Republic of Pakistan, (Ed.1967) P.. 78.

another person to do something, must show that the law gives him the authority to compel the person to do the particular act. To put the rule in other words, every public functionary or person must show legal authority for his interference with the right of another person.

It has been held[1] that,

"any invasion upon the rights of citizens by anybody, no matter whether by a private individual or by a public official or body, must be justified with reference to some law of the country."

The aforesaid principle is embodied in Article 2. This Article, in words of Murshed, C.J.[2](of East Pakistan High Court) "is a codification of the ever-growing and elastic concept of 'due course of law,' as conceived in the American Constitution, and is now embedded in our Constitution, as a doctrine which cannot be altered by the ordinary machineries of legislation." Article 2 may sound like the Fifth and Fourteenth Amendments of the United States Constitution, which are usually referred to as the 'due process clauses' but its scope is not as wide as of those

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(1) Muhammad Hussain v. General Manager, E.B.Railway, P.L.D.1961 Dacca 730.

(2) Haji Ghulam Zamin v. Khondhar, P.L.D.1965 Dacca 156.

Amendments. The concept of 'due process' is not precise. The phrase sometimes even refers to all those principles of law and natural justice which the American Supreme Court has considered applicable to the facts and circumstances of each case in order to preserve "the blessing of liberty."(1) Originally 'due process' was a procedural concept, but the Supreme Court extended it to substantive laws by insisting that the statute must include 'Just procedure.' The result is that the Court can read the requirements of 'due process' into statutes, even if Congress prescribes a different procedure.(2) On the other hand, Article 2 does not contain the phrase 'due process of law' but "in accordance with law."(3) That is to say, an individual has full protection against arbitrary executive action, unless and until the Legislature passes a law prescribing the extent to which

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(1) (Chambers v. Florida, (1940) 309 U.S.227
(Wolf v. Colorado, (1949) 338 U.S.25.

(2) C.Herman Pritchett, The American Constitution (1959) P.554

(3) There is a common belief among some lawyers that the phrase "due process of law" was intentionally omitted on the advice of the visiting Judge of the Supreme Court of America, who advised that the phrase "due process of Law" could be a great headache for the judges and the State.

and the procedure by which a person may be deprived of his life-, liberty, or property. This does not mean that the executive can equip itself with any power it thinks necessary, by inducing the legislature to pass a law granting it. The law-making power of the State is pre-conditioned by the Constitutional requirement that no law can be made which takes away or abridges any of the "fundamental rights."(1)

Article 2, read with the provisions of 'fundamental rights', therefore, requires the judiciary to see that no public functionary interferes with the rights of the people, except on condition that his action is supported by the authority of a law, which is not in any way repugnant to the Constitutional rights.

Where a statute itself is unconstitutional, action taken under its authority must be vacated, but even if the statute is ex-facie valid, any executive action under it may be questioned on the ground that it contravenes any of the fundamental rights,(2) because the essential characteristic of these rights is that they impose limitation on all public authorities, executive, legislature and judicial, prohibiting

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(1) Article 6 (2) Constitution of Pakistan 1962.

(2) East and West Steamship Co. v. Pakistan, P.L.D.1958 S.C.14

them from interfering with their exercise.(1) But the Executive may be empowered to depart from normal judicial procedure, in special circumstances.(2)

Article 2 was invoked in the case of Haji Ghulam Zamin(3), before the Full Bench of the East Pakistan High Court. It was held that, "It furnishes a citizen with a constitutional guarantee that he will not be called upon to do something or to refrain from doing anything without a valid provision of law to that effect. This means that there is a constitutional protection in praesenti; or, in other words, whenever an order is made which invades upon the rights of citizen or requires him to do something, there must be, in existence, contemporaneously, a law which would authorize such a course. If there is no such contemporary law in existence, the order would fall there and would become tainted with illegality as it would come within the mischief of a guaranteed constitutional protection. .... the law or legislation as contemplated by Article 2 must, of necessity, mean a contemporaneous law. To hold otherwise would be tantamount to rendering Article 2 nugatory and ineffective.

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(1) Province of East Pakistan v. Mehdi Ali Khan, P.L.D.1959 S.C.387

(2) Bazal Ahmad Ayyubi v. W. Pakistan, P.L.D.1957 Lah.388

(3) Haji Ghulam Zamin v. Khondkar & others, P.L.D.1965 Dacca 156.

The said Article is not a mere rope of sands. Article patently gives a constitutional protection, that is a protection in praesenti: Can there be doubt that the term 'law', as mentioned in Article 2 means a co-existent law? The invasion, and the law which is supposed to justify it, must be co-related and co-existent. They must go together contemporaneously. The guarantee that has been given by the Constitution cannot be washed away by an ingenuous legislative device, which can wipe out an illegal invasion of today by an artful enactment of tomorrow, pretending to act retrospectively, without any constitutional change to that effect."

It was further held that, "A Constitutional right cannot be taken away by a legislative 'fiction,' without a constitutional amendment, which would permit such a course. There is a world of difference between a legislative immunity and a constitutional guarantee. The Constitution, by its very nature, creates the distinction. A Constitutional immunity cannot be wiped out by such a simple method. The hand of a constitutional clock is incapable of manipulation by a simple legislative contrivance, as opposed to constitutional amendment. Article 2 of our constitution is nothing but a Constitutional protection."

The word "law" which is repeatedly used in Article 2 is not defined by it. If of course includes, but does not seem to be confined to, statute or enacted law. Personal law and customs, to the extent they are recognized by statute and international law, are laws as the word seems to have been used here in its general sense.(1)

In Haji Ghulam Zamin's case,(2) it was contended that the expression "Law" in Article 2 and other Articles of the Constitution, connotes comprehensible and intelligible laws. The question was, however, left open by their Lordships. In Muhammad Yusuf's case(3), where the argument was that the Displaced Persons Laws Amendment Ordinance, 1965, is devoid of effect in relation to all orders made before the promulgation of the Ordinance, inasmuch as the effect of Article 2 of the Constitution was that no person can be treated in respect, inter alia, of property, otherwise than in accordance with the law in force at the time of such treatment; in other words, in accordance with contemporaneous law.

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(1) Munir, Constitution of Islamic Republic of Pakistan, Page 78.

(2) P.L.D. 1965 Dacca 156.

(3) Muhammad Yusuf v. The Chief Settlement Commissioner, P.L.D.1968 S.C.101

It was held, "to give the fullest effect to this argument would operate as a prohibition against the making of laws with retrospective effect in respect of all matters that are specified in Article 2. We do not conceive that the Article was intended to produce so wide an effect in relation to the well established practice of retrospective or retro-active legislation. It is difficult to construe Article 2 as conveying a fundamental right on every citizen of Pakistan and every person for the time being within Pakistan against the making of laws by the established legislature, which expressly operates retrospectively or retro-actively against his interest."
Although, as the Supreme Court has held, there is no guard against making the retrospective legislation in regard to all matters specified in Article 2, there is protection against retrospective substantive penal legislation in Right 4.

The violation of the rights of people given to them by Article 2 are safeguarded by Article 98 of theConstitution which empowers the High Courts to make appropriate orders for that purpose.(1) Reading Article 2 with Article 98 of

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(1) S.M. Yousuf v. Collector of Customs, P.L.D.1968 Kar.599.

the Constitution, one is led to the conclusion that a party who stands to gain a benefit or advantage by the observance of law can consider himself to be an aggrieved party, if the law is not observed or he is deprived of that benefit or advantage.(1)

In Begum Agha Shorish Kashmiri's case(2), their Lordships of the Supreme Court, referring to the word 'law' used in the Article 2 said, "Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country, including even the judicial principles laid down from time to time by the Superior Courts. It means 'according to the accepted forms of legal process' and postulates a strict performance of all the functions and duties laid down by law. It may wellbe, as has been suggested in some quarters, that in this sense it is as comprehensive as the American "due process" clause in new garb. It is in this sense that an action, which is mala fide or colourable, is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not 'action in accordance with law.' Action taken upon no

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(1) Mohd. Ashraf v. Board of Revenue, P.L.D.1968 Lah.1155.

(2) Govt. of W.Pakistan v. Begum Agha Shorish Kashmiri, P.L.D.1969 S.C.14

ground at all or without proper application of the mind of the detaining authority would also not qualify as 'action in accordance with law' and would, therefore, have to be struck down as being action taken in an unlawful manner."

In Malik Mir Hasan's case(1), it was held that, "The Article provides that no person shall be deprived of life, liberty, body, reputation or property without due process of law. It further declares that any public functionary or person taking an action affecting the life, liberty, body, property or reputation of a person or affecting his profession, trade or business, must rely on some law to justify his action. In other words, every public functionary or person must show legal authority for interference with the right of another person. Thus a direction or order by a public functionary would be invalid, if it does not have the backing of a valid contemporaneous law."

It was also held that even the actions of a Martial Law authority, however high he may be, if it had not the

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(1) Malik Mir Hasan v. The State, P.L.D.1969 Lah.786

backing of a Constitutional provision, was not immune from being struck down by the Courts of the Country.

In Ghaus Bakhsh's case[1] where the Commissioner, under the Provisions of West Pakistan Criminal Law (Special Provisions) Ordinance, 1968, confirmed a sentence, before the expiry of the period of appeal, it was held that, "the petitioner's right of challenging his detention under Article 2 is available to him."

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(1) Ghaus Bakhsh Bizanjo v. The State, P.L.D.1969. Kar. 527.

CHAPTER X

CONCLUSION

The Law of Preventive Detention, empowers the Executive, subject to observance of a certain procedure, to detain a person on its subjective satisfaction without trial on specified grounds, for a limited time which can be prolonged, according to the provisions of the statute under which a man is detained. The object of such detention is not to punish the man for having done something but to prevent him committing an act, which may be prejudicial to defence, security of the State or the maintenance of public order and peace, or to prevent the individual from acting in a particular way to achieve a particular object.(1) Preventive detention is not punitive but precautionary. No offence is proved nor any charge formulated and the justification is suspicion or reasonable probability and not criminal conviction, which only can be warranted by legal evidence.(2)

The justification for such action is that, during a period of instability, the government has no time to wait

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(1) Farid Ahmad v. Govt. of West Pakistan, P.L.D. 1965 Lah.135

(2) Goplan's Case. A.I.R.1950 S.C.27

for the verdict of a Court, which may, in certain cases, go against the wishes of the executive. As the basis of detention is an apprehension, based on the detenu's past conduct or information as to the action, which he may take in future and therefore it is not possible to lay down any objective standards to come to this conclusion. To do so may create difficulties in the maintenance of law and order. If in such cases, the Executive must investigate and prove evidence to satisfy judicial standards, it may become difficult for it to take action which otherwise is necessary to prevent prejudicial action on the part of the suspected person. It may happen that, before it succeeds in collecting the necessary evidence, the person concerned may succeed in his object.(1) In war time no body has questioned or criticised the existence or the need of such legislation. In England, during the First War, Parliament had to pass The Defence of the Realm Consolidation Regulation, 1914, to meet emergency; under this statute a number of Regulations were made, including Regulation 14-B, which permitted the Secretary of State to subject any person "to such obligations and restrictions as hereinafter mentioned in view of his hostile origin or associations."

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(1) Farid Ahmad v. Govt. of West Pakistan, P.L.D.1965 Lah.135

While dealing with the merit of a case under Regulation 14-B, Scrutton L.J. observed in his judgment,

"The courts were always anxious to protect the liberty of the subject. They did so both in the interest of the subject himself and in the interest of the State. In time of war, there must be some modification in the interests of the State. It has been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried on according to the principles of Magna Carta."(1) The Second World War again necessitated the passing of the Emergency Powers (Defence) Act of 1939, which gave powers to the executive to make regulations for the purposes of public safety, defence of the realm, maintenance of public order, the efficient prosecution of the war, the maintenance of supplies and services essential to the life of the community, the apprehension, trial and punishment of persons offending against the Regulations and detention of persons "whose detention appears to the Secretary of State to be expedient in the interest of public safety for the defence of the realm."

The Regulation which directly dealt with preventive

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(1) Ronnfeldt v. Phillips, (1918) 35 T.L.R. Page 47.

detention was 18-B, and came up for consideration in Liversidge's case[1]. It was observed by Lord Macmillan, "In time of emergency, when the life of the whole nation is at stake, it may well be that a Regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the Courts would be slow to attribute to a peace time measure.... The liberty which we so justly extol is itself the gift of the law and, as Magna Carta recognises, may by the law be forfeited or abridged. At a time when it is undoubted law of the land that a citizen may, by conscription or requisition, be compelled to give up his life and all that he possesses, for his country's cause, it may well be no matter of surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention." During war, as just seen, the need and justification for preventive legislation has been upheld in a democratic country like Britain.

After the Second World War, the provision for preventive detention in case of emergency was introduced by the Internal Security Act, 1950, in the United States of America.

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(1) Liversidge v. Anderson, 1942 A.C.206

The reason was that Americans were not happy with the arrangement they had made to meet the emergencies during war. This law was intended to meet emergencies in future. The question arises why does Pakistan need such legislation during peace time?

The need for such preventive legislation is that the peace and stability of our country is permanently threatened by anti-social elements. Within twenty-two years of its existence, the constitution has been twice abrogated and each time Martial Law has been declared. When Pakistan came into existence as an independent State, the initial problems with which we were faced have already been pointed out in Chapter on "Justification for Preventive Detention," and I only want to point out what happened during the last days of Ayub Khan's reign, when the people took the law into their own hands to overthrow Ayub's Government and restore democracy in the country.

At the end of 1967 and the beginning of 1968, some agitations were started by the political parties. The first objective of these parties was to return to universal suffrage, instead of the system of basic democracy, introduced by President Ayub Khan in 1962. The way the parties and their supporters launched their protest will be

clear from the following description of the events which afterwards led to the imposition of martial law in the country. Pakistan underwent a period of political and economic crisis. Ayub Khan offered to talk to the opposition, in an attempt to solve the political crisis. The parties rejected this offer and said that there was nothing to talk about; the people wanted the end of the existing system.(1) In support of these demands, long processions were organised and they indulged in violence. It is estimated, according to The Daily Telegraph dated 3rd February, that at least thirty people were killed. After some time the parties in opposition agreed to meet the President on condition that the Emergency Regulations, imposed in 1965 at the time of Indo-Pakistan conflict, were lifted. Mr. Z.A.Bhutto, who was at that time under detention, intervened dramatically by saying that he would fast until death, unless the emergency was lifted.(2)

On the 9th February, the largest anti-government rally was held by 100,000 persons, including a large number of students and others; their slogans were "Down with Ayub,"

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(1) The Times, (London), February 3, 1969

(2) Ibid ....., February 7, 1969

"We will face bullets for full democracy." Effigies of Ayub Khan and his book 'Friends, not Masters' were burnt. Angry mobs burnt down the houses belonging to Ayub Khan's supporters.(1) On the following day demonstrations also occurred in Peshwar, as a part of general agitation against the rule of Ayub Khan. Militant students, joined by hooligans, threw bricks at the home of Vice-Chancellor of Peshwar University and marched into the city, smashing sign boards and traffic signals.

On 12th February, the police fought a four hours battle with the students in Lahore, who attempted to march on the Governor's residence, where President Ayub Khan was staying on his way to the capital. Shouting "Death to Ayub" and "Give us Democracy," about 5,000 students attempted to break through the strong police cordons and barbed wire cordons surrounding Government House.(2)

On the 14th of February five people were killed in West Pakistan in an outbreak of violence during a twelve hours national protest against the regime. There were bitter clashes in Lahore, Karachi, Peshwar, Rawalpindi and Hyderabad,

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(1) The Times, (London), February 10, 1969

(2) Ibid ....., February 13, 1969

where the army was called in to reinforce the police, when the mob attacked railway property and attempted to burn down government storehouses. In Lahore the situation was so tense and so close to mob rule, that it was apparent that neither the government nor the opposition had much control over the mob. Next day serious rioting and disorder started in Dacca; mobs attacked and set fire to the State Guest House of the President. This was followed by the imposition of a twelve hours curfew. On 17th February, the emergency proclamation was revoked and a few hours later there were clashes between the mob and the police in Karachi.(1) This month ended in clashes between the demonstrators and Police and the destruction of national property.

During the month of March the final phase of unrest in Pakistan began and looting, arson and killing spread throughout Pakistan. Vital services were brought to a standstill by the strikes of doctors, postal workers and ten thousand dockers in Karachi and in Lyallpur attempts were made to burn the Kohinoor Textile Mill in a campaign against industrialists. It was feared by the diplomats and other observers that the Pakistan was heading towards the point

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(1) The Times (London), 14, 15 and 18th February, 1969.

of no return. After the middle of March, there was so much lawlessness, that the police became powerless and had to leave the city of Dacca to mob rule. In Dacca a curfew had to be imposed, after the mob had burnt down a big rice mill and the entire residential area. A reign of terror gripped East Pakistan, with the setting up of "people's courts," meting out instant death sentences to scores of alleged wrongdoers before applauding mobs of peasants. On March 19, the Pakistan Government conceded that mob rule had taken over and ordered tough measures to deal with the mounting unrest. Instructions were issued to the administration to take urgent preventive and punitive measures to quell disorder(1) but these proved fruitless. Without going into details of the political reasons for this violence, it is quite clear that the opposition parties and their supporters rejected constitutional means to bring about the change in the country. The opposition may argue that there was no room for constitutional means during the rule of Ayub Khan, but history will say that the course adopted was not the proper course open to the people to secure a change of government. The way the people demonstrated their grievances suggests that even preventive

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(1) Ibid 7, 19, 20th March, 1969.

detention cannot cope with such a situation and only martial law can restore peace in the country.

The sort of agitation we have in our country, the people in the West may never have the chance to see. Not all the politicians or political parties can be entrusted to take over the administration of the country. Those who remain in the opposition will inevitably try to secure their ends by violence. To check violence, which leads to the breakdown of civil administration, some sort of legislation is necessary and law of preventive detention in such circumstances has proved to be useful.

We are not the only country in the world to have such legislation during peace time; countries like Greece, Turkey, Spain, Portugal, Yugoslavia, Russia, Czechoslovakia, Poland, Hungary, East Germany, Bulgaria, Rumania, Albania, China, Burma, Singapore, Malaysia, India, Ceylon, South Korea, North Korea, North Vietnam, Indonesia, Thailand, Egypt, Iraq, Lebanon, Jordan, Syria, Iran, Morocco, Algeria, Tunisia, Somalia, Ghana, Zambia, Sierra Leone, Kenya, Uganda, Tanzania, Malawi, Guinea, Ethiopia, South Africa, Rhodesia, Chile, Costa Rica, Uruguay, Venezuela, Argentina, Paraguay, Mexico have it.

The term 'preventive detention' is also to be found in

Article 13 of the Italian Constitution, which gives a detailed specification of the right to personal liberty. Preventive detention is also an integral part of the criminal law in democratic states like France and Belgium. Under Section 4 of Offences against the State (Amendment) Act of the Irish Republic, any person may be arrested and detained who, in the opinion of Minister of State, is engaged in activities prejudicial to the preservation of public peace and order or the security of the State.

As a matter of fact such legislation has been retained in our statute books as a matter of painful necessity.

The Constitution, while giving Fundamental Rights to the Citizen, has also conferred power on the Government to make laws relating to preventive detention. Just as fundamental right cannot be taken away by subsequent subordinate legislation, this right, I think, cannot be also taken away, except by amendment of the Constitution. The safeguards as to arrest and detention, which are available to the person arrested under the ordinary law, are not available to the person preventively detained; in other words he is denied the right to be produced before the nearest magistrate within twenty-four hours of his arrest or to engage lawyer of his own choice to defend his case. But he is provided with

certain other safeguards which are that, if the period of detention exceeds three months, his case must be referred to Advisory Board, to report on the sufficiency of the cause for detention beyond three months; if the period of detention is less than three months he loses this right. He has a right to be informed, as soon as may be, of the grounds on which the order of detention has been made, and he has an opportunity of making a representation against the order of detention. The courts, being aware of the fact that preventive detention is an encroachment on the liberty of the subject, have been always insistent that these meagre safeguards should be strictly complied with before a person can be detained. It has been observed "The provision of a statute, which imposes restrictions on the personal liberty of a subject, must be strictly complied with, before an order of detention without trial in a regular court of law, can be upheld by the courts. The liberty of the subject is too precious an asset to be interfered with, unless an order of detention is passed strictly in accordance with the provisions of the detention law, however formal in character they may appear to be, and all the statutory obligations enjoined on the detaining authority must be carried out to the letter."(1)

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(1) Siraj-ud-Din v. The State, P.L.D.1957 (W.P) Lah.962

Whenever a case has been brought before the court, the courts have always set aside the detention order, whenever there has been any sort of irregularity in the procedure.

The constitution of the Advisory Board was held to be improper[1] when the officer appointed by Government had been concerned in the making of the order of detention. His participation in the proceedings of the board were held to be a violation of natural justice. The fact that the Advisory Board is there to look into cases of detention does not mean that the detenu loses his right to the other remedies which are available to him as a citizen under Article 98. The opinion of board does not make the detention legal, if otherwise it can be proved to be illegal. When the detention of a person cannot be justified in law, there is no reason why the detenu should not be able to invoke the jurisdiction of the High Court immediately for the restoration of his liberty. In all cases where a person is detained, and he alleges that his detention is in violation of the safeguards provided in the constitution or that it does not fall within the statutory requirements of the law under which the detention is ordered, he can invoke the

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(1) Rehmat Elahi v. Govt. of West Pakistan, P.L.D.1965 (W.P) Lah. 112

jurisdiction of High Court under Article 98 of the Constitution and ask to be released forthwith.(1)

The detenu is entitled to the grounds on which the order of detention is made. "Grounds" has been interpreted as the conclusions, based on facts, leading to the order made by the detaining authority.(2) It is the constitutional right of the detenu to obtain all the grounds on which the order of detention against him has been made and none of them can be withheld from him by the Government.(3) Mere reproduction or the words of the section under which action has been taken are held not to be the grounds.(4) It is the right of the detenu to obtain all the grounds on which the authority makes its order of detention. Additional grounds cannot be given after the grounds have been furnished to the detenu; the grounds cannot be subsequently amplified or clarified. Though new grounds cannot be added, there is nothing to bar the communication of particulars or facts relating to the grounds already supplied, by one or more

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(1) Maulvi Farid Ahmad v. Govt.of West Pakistan, P.L.D.1965 (W.P.) Lah.135

(2) Narasimhamurty v. State, A.I.R.1951 Orissa 251

(3) Ghulam Muhammad Khan v. The State, P.L.D.1957 Lah.497

(4) State of Bombay v. Atmaram, A.I.R.1951 S.C.157

subsequent communications, provided the "earliest" opportunity of making representation is not denied to the detenu.(1) Describing the contents of the second communication to the detenu as "supplementary grounds" does not necessarily make them additional or new grounds. One has to look at the contents to find out whether they are new grounds or not. When they only furnish details of the grounds furnished to the detenu previously, they cannot be treated as new grounds. Further the fact that the details were communicated later does not necessarily show that they were not within the knowledge of the authorities, when they sent the first communication of the grounds.(2) The grounds must be exact and precise and sufficient particulars regarding grounds must be given to enable the detenu to make his representation.(3) Although there is no express provision in Right No.2 that particulars of grounds of detention must be given to the person detained, the furnishing of particulars may be necessary in order to enable the detenu to make an effective representation.

Though the Constitution does not lay down any obligation

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(1) Ibid

(2) Tarapada v. State of W.Bengal, A.I.R.1951 S.C.174

(3) Mrs. Rowshan Bijaya Shaukat Khan v. Govt.of East Pakistan, P.L.D.1965 Dacca 241.

to give 'particulars or details' and has left it to the discretion of the detaining authority to disclose or withhold facts, it cannot be held that a mere recital of the clauses of the statute, without giving any particulars or details, would suffice, for, without particulars, it may not be possible to make a representation, which is the very object of communicating grounds.(1) It is true that the detenu is not entitled to know the evidence, nor the source of information, but he must, "as a matter of right," be furnished with the grounds for his detention and sufficient details to enable him to make out a case, if he can, for the consideration of the detaining authority.(2) The mere statement that the detenu had been carrying on 'subversive propaganda' conveys no precise information to the detenu, so as to enable him to make a proper representation.(3) Similarly, an allegation of 'secret or underground activity,' without particulars as to the nature of such activities, is vague, for 'secret activity' does not necessarily mean that it is an activity subversive of public order.(4) The particulars must be served within a

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(1) State of Bombay v. Atmaram, A.I.R.1951 S.C.157
(2) Durgadas v. Rex, A.I.R.1949 All.148, 151.
(3) In re Krishanaji, A.I.R.1948 Bomb.360
(4) Nek Mohammad v. Emperor, A.I.R.1949 Pat. 1.

reasonable time, for, without particulars, the detenu will not be in a position to enforce his constitutional right to make an effective representation. The courts have always insisted that the procedural safeguards are strictly complied with and the executive must fulfil the formalities. If the grounds supplied to the detenu are vague, that is, they are incapable of being understood with sufficient certainty, the courts will set the detenu at liberty.(1)

It may so happen that the executive authority wants to detain a particular person but has not got any valid grounds and it just inserts as grounds for the order of detention, grounds which are either irrelevant, that is not relevant to the objects specified in the law or the detenu may be served with several grounds, some of which are either irrelevant or non-existent; the court has held in such cases that the detention is invalid,(2) even if there were other relevant grounds, because it can never be certain to what extent the irrelevant or defective grounds operated on the mind of the detaining authority or whether the detention order would have been made if only the valid reasons had been before him.

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(1) Mrs. Rowshan Bijaya Shaukat v. Govt.of East Pakistan, Ujagar Singh v. State of Punjab, A.I.R.1952 S.C.350

(2) Rehmat Elahi v.Govt.of Pakistan, P.L.D.1965 Lah.112
Dwarka Das v. State of J and K., A.I.R.1957 S.C.164

In such a case the court is bound to quash the order, unless it can be predicated that the defective ground was of an unsubstantial or inconsequential nature. Where the detention order stated that detention was necessary to prevent the petitioner from acting in a manner prejudicial to the maintenance of supplies and services, essential to the community, and it was alleged that the petitioner was smuggling essential goods, such as shaffon cloth, zari and mercury and it was found that shaffon cloth and zari had not been declared 'essential goods', the order was quashed.(1) There is no doubt that the grounds are to read together, but the detenu, who is denied legal aid, cannot be expected to interpret irrelevant grounds in the light of another ground, as a lawyer would have done, in accordance with the rules of interpretation of documents.

The reasons for holding a detention order invalid, when the grounds are non-existent or irrelevant, were explained by the Supreme Court of India in the following words(2) :-

"Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction

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(1) Dwarka Das v. State of J and K, A.I.R.1957 S.C.164

(2) Ibid

with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, and if some of them are found to be non-existent or irrelevant, the very exercise of that power is bad. That is so, because the matter, being one for the subjective satisfaction, it must be properly based on all the reasons on which it purports to be based. If some of them are found to be non-existent or irrelevant, the Court cannot predicate what the subjective satisfaction of the said authority would have been, on the exclusion of these grounds or reasons. To uphold the validity of such an order, in spite of the invalidity of some of the reasons or grounds, would be to substitute the objective standards of the Court for the subjective satisfaction of the statutory authority. In applying these principles, however, the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some grounds or reasons of a comparatively unessential nature are defective that such an order based on subjective satisfaction can be held to be invalid. The Court, while anxious to safeguard the personal liberty of the individual, will not lightly interfere with such orders."

The declaration of the grounds may enable the detenu to demonstrate mala fides on the part of the detaining authority; if the grounds are not fully furnished to the detenu he may argue that this indicates mala fides of the detaining authority, who has denied him rights to which he is entitled. The order of detention is mala fide, if it is made for a collateral or ulterior purpose, i.e., a purpose other than what the legislature had in view, while passing the law of preventive detention. Detention orders were set aside as mala fide, where the grounds for detention stated were exhibition of posters allegedly containing material prejudicial to public order. But in fact, the contents of the posters were no more than an election manifesto on behalf of combined opposition parties against a candidate of the ruling party and were not, as such, likely to incite the general public to commit acts of violence or breaches of peace; the grounds for detention were not relatable to the statutory purpose of detention.(1)

A plea of mala fides cannot succeed on mere vague allegations. There should be some specific allegations of mala fides. The mere fact that the detention order followed

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(1) Abuzar v. Province of West Pakistan, P.L.D.1966 (W.P) Kar. 260.

the release of the detenu on bail in a separate criminal case is not sufficient to hold such order to be mala fide. Thus in Miraj's case[1] the detenu was already in jail in connection with a separate criminal case. On the day on which he was to be released on bail by order of the High Court, the detenu was served with a detention order under Section 3 of The West Pakistan Maintenance of Public Order Ordinance, 1960. It was urged that, since the detention order followed the release of the detenu on bail, the order was mala fide. It was held, that it was not possible on this single circumstance alone to hold that the order was mala fide. Possibly the detention order was made to deprive the detenu of the liberty restored to him by the bail order of the High Court, but it was equally possible that the detaining authority had an honest conviction that the petitioner was not a person to be allowed free movement and action in the context of the situation then prevailing, without detriment to the maintenance of law and order. In the absence of any proof that the action of the detaining authority was motivated by malicious intent and purpose, which the petitioner must prove as a fact, the Court was unable to attribute any malice to the detaining authority.

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(1) Miraj Mohd v. Govt. of West Pakistan, P.L.D.1966 (W.P.) Kar. 283

It is legitimate for a detaining authority to base his satisfaction that the detenu is likely to act in a prejudicial manner on the past activities of the detenu. But the past activities must be related to the situation existing at the moment when the detaining authority makes the order. If the detaining authority, on proper material, is satisfied that such relation exists, it will be difficult for the court to hold the detention illegal[1] on the ground of mala fides. Recourse to preventive detention, where the ordinary law would be sufficient to meet the needs of the case, may lend colour to the conclusion that the order is mala fide. It cannot be stated as a rule of law that, when a person is accused of an offence, the only course open to the authorities is to prosecute him under the ordinary law and that he cannot be detained. The right to prosecute a person under the ordinary law and the right of the executive to detain a person are not exclusive but are independent of each other. There is no rule of law that, unless a choice of one of the two alternatives, that is prosecution or detention, is made at the earliest moment, the order of detention must be held invalid. The proper approach is to consider the facts of each case and then

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(1) Mahbub Anam v. Govt. of East Pakistan, P.L.D.1959 Daeca 774

consider whether the order of detention is mala fide or not. No doubt there will be cases in which there will be a clash between the different rights, if both detention and prosecution are made at the same time. Cases can be imagined in which the activities of a person might be of a most dangerous type and yet there may not be enough evidence to secure a conviction or witnesses may not be forthcoming. In a case like this and others, it might not be possible to take action under the ordinary law and the detention of person may be considered essential. But on the other hand when a man is already under arrest under the ordinary law, and an order is passed for his detention, such order is at least undesirable even though it may not be wanting in good faith.(1) The onus of proving mala fides is upon the detenu and the trend of the recent decision shows that the burden is heavy.

It is true that an executive authority must exercise its authority honestly and without malice and it is the duty of the Courts to see that a fraudulent exercise of such power or colourable exercise of it, to gain ulterior object, is stifled. But the question of mala fide exercise of power is one of fact in each case and the onus is on the detenu to show that the

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(1) Mahbub Anam v. Govt. of East Pakistan, P.L.D.1959 Dacca 774

order of detention is, in fact, a fraudulent exercise of power vested in the Government and he can sustain that burden only if he can successfully rebut the presumption of bona fides on the part of the Government.(1)

The power of preventive detention is based on the "satisfaction" of the detaining authority that it is necessary to detain a specific person, because he is likely to act in a manner prejudicial to the public safety, the maintenance of public order or the security of the State. The satisfaction of the Government or the detaining authority, its nature and the right of the detenu to challenge it before the Court are questions of fundamental importance and many legal battles have been fought over the satisfaction clause, contained in the various statutes and ordinances. The satisfaction of the detaining authority may be based upon the past activities of the detenu, if such activities, in the opinion of the detaining authority, give rise to the apprehension of prejudicial conduct on his part in the future or his past objectionable activities have a relation to the existing situation. The satisfaction contemplated by the various Acts, must be that of the particular authority empowered by

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(1) Miraj Mohd v. Govt. of West Pakistan, P.L.D.1966 (W.P) Kar. 283

law to pass the order of detention; the empowered authority cannot act as the satisfaction of another official of Government.

The satisfaction must be that of the detaining authority and not of the Court; it must be honest, bona fide, not unreal, sham or mala fide. It must be reasonable satisfaction, not arbitrary or irrational. In a case under The West Pakistan Maintenance of Public Order Ordinance, 1960, it was observed[1] that, "It is for the detaining authority to judge and put its own interpretation on the suspected prejudicial acts of an intended detenu for its own subjective satisfaction and it does not fall within the province of the Courts to probe into that satisfaction or analyse the substance and quantum of the evidence on which that satisfaction is based." In Abid Mirza's case[2], a case under the same ordinance, it was held that the satisfaction contemplated by the Ordinance is the satisfaction of the authority, which passes the order under Section 5. At the same time it cannot be disputed that, before such an order is passed, the authority has to apply its mind to all the material, which is relevant and to which

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(1) Miraj Muhammad v. Govt. of West Pakistan, P.L.D.1966 Kar. 282

(2) Abid Ali Mirza v. Govt. of West Pakistan, P.L.D.1967 Kar. 408.

its attention must be drawn. It must be remembered that, under Section 5, the Government had to be satisfied that, with a view to preventing the petitioner from acting in a manner prejudicial to public safety, it was necessary to pass an order. That being the requirement of law, the Government has to have all the necessary material placed before it, which it would have to examine and apply its mind to. To sum up, it is clear that the satisfaction that is expected is that of the authorised official, entrusted with the duty of maintaining peace and order.

The higher courts of Pakistan deserve great credit in that they have always shown their determination to keep a proper balance between the needs of law and order on the one hand and the liberties of the subject on the other hand. As a guardian of the Constitution and chief interpreter of the law, whenever any constitutional problem has arisen, the courts have taken into consideration the circumstances prevalent in the country. Thus in The Federation of Pakistan v. Maulvi Tamiz ud Din's case[1], a case which is of historical importance, it was the Federal Court of Pakistan, which came to the rescue of the Government of Pakistan and

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(1) P.L.D. 1955 F.C.240

saved the nation from disaster. Consequently Government might have thought that whenever it is in trouble and there is any question as to the interpretation of the constitution, the decision will be in favour of the Government. But this presumption proved to be false when Fazlul Qader's case[1] came up before the Supreme Court of Pakistan and it was held that, "There can be no estoppel on a question of law and therefore what is opposed to the Constitution cannot be made valid and constitutional by invoking the doctrine of estoppel;" the legislation in question was held to be invalid and the decision was an embarrassment to the President of Pakistan. The Supreme Court of Pakistan, being aware of the needs of the country and independent of executive influence or control, has always kept its prestige by playing a fair role in judicial matters.

Our Courts have never looked at the preventive legislation with favour and have been critical of such legislation whenever they thought it necessary. As was observed by Yaqub Ali, J;[2] "if the unfettered authority of the Government to detain a person in preventive custody

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(1) Fazlul Quader Chowdhry v. Muhammad Abdul Haq, P.L.D.1963 S.C.486.

(2) Rehmat Elahi v. Govt.of Pakistan, P.L.D.1965 (W.P) Lah. 112.

infringes on the concept of liberty enshrined in Article 2 of the Constitution and the Fundamental Rights contained in Chapter I, the remedy is to bring the law on the subject into conformity with the will of the people and their good sense but not by the will of Court." As the court cannot change this law, the courts have always upheld the procedural safeguards available to the detenu and have exercised their discretion in favour of the right of detenu, when possible.

Until recently, whenever a case of preventive detention has been brought before the Court, the courts followed the ruling laid down in Liversidge's case[1] that the satisfaction of the detaining authority is not subject to judicial review. The courts might have rejected this as a war time ruling but they did not do so. But Article 2 of the Constitution of 1962 created the opportunity for the courts to consider the whole question of the "satisfaction" of the government.

In Ghulam Jilani's case,[2] the Supreme Court of Pakistan considered the question of judicial review of detention orders under the Defence of Pakistan Rules. The Supreme Court, (per Cornelius C.J.,) held that, "a mere

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(1) Liversidge v.Anderson, 1942 A.C.206

(2) Malik Ghulam Jilani v. The Govt.of West Pakistan, P.L.D.1967 S.C.373.

declaration of executive "satisfaction" is not sufficient to justify detention. The existence of reasonable grounds, though not expressly required by the relevant rule, is essential." The court also held that, "It was the function of the judiciary to ascertain the existence of reasonable grounds." In arriving at this decision, the court found support in Article 2 of the 1962 Constitution, which requires every citizen to be treated in accordance with law and in Article 98, which the court construed as conferring power on a superior court to examine every exercise of executive power in ascertaining its lawful authority."

Obviously this decision was embarrassing to the executive, so the executive amended the Defence of Pakistan rules, with intent to render the satisfaction of the executive authority immune from judicial review. Thus Clause (x) of the sub-section (20 of section 3) of the Defence of Pakistan Ordinance, 1965 was amended by Ordinance Number 2 of 1968, with the specific object of excluding the power of the High Court to examine either the sufficiency or the reasonableness of the grounds of detention under the said ordinance. In two cases, which came up after the amendment, the Supreme Court of Pakistan reaffirmed the rule laid down in Ghulam Jilani's case and it was held that, in this view of

the matter, the amendment to clause (x) of section 3(2) of Defence of Pakistan Ordinance had been "an exercise in futility." The amendment had in no way affected the reason given by the court in Ghulam Jilani's case.(1)

It is the Constitutional right of the detenu that he should be informed of the grounds of his detention as soon as may be, so that he can avail himself of his constitutional right to make a representation against the order. The phrase "as soon as may be" means as soon as feasible in the circumstances of each case. If the grounds are not communicated as soon as may be, there would be an infringement of his Fundamental Right, guaranteed by the Constitution and his detention would become illegal. The phrase "as soon as may be" has been explained as follows :- "This (expression) allows the authorities reasonable time to formulate the grounds on the materials in their possession. The time element is necessarily left indeterminate, because activities of individuals tending to bring about a certain result may be spread over a long or short period, a larger or smaller area, or may be in connection with a few or numerous individuals. The time required to formulate the proper grounds of

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(1) Abdul Baqi Baluch v. Govt.of Pakistan, P.L.D.1968 S.C.313

Govt.of West Pakistan v. Begum Agha Shorish Kashmari, P.L.D.69 S.C.14.

detention, on information received, is bound to vary in individual cases."[1] This ruling allows the executive to take such time as is necessary to consider the activities of a person, spread over the country and to collect the necessary material to formulate the grounds, but this must not be abused. When the executive wishes to detain a person, it must have all the grounds before it, and these grounds must be furnished to the detenu along with the order of detention, although there may be exceptions in rare cases.

The Lahore High Court has aptly said that "the words 'as soon as may be' must be taken as indicating the intention of the law-maker that the grounds must be served without any avoidable delay, keeping in view the circumstances of the case." Their Lordships went on to say that the question whether this has been done is clearly a matter open to judicial review. The phrase "as soon as may be" must, in the vast majority of cases, mean simultaneously with or soon after the order is made. If there is any delay, it must be justified to the satisfaction of the Court. And if sufficient cause is not shown for not communicating the grounds as soon as possible, then the detention order in question must be

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(1) State of Bombay v. Atmaram, A.I.R.1951 S.C.157

declared to be without lawful authority, on account of its failure to comply with an essential requirement of the law under which it is issued. In the instant case there was a delay of thirty-five days in serving the grounds of detention, allegedly on account of the preoccupation of the officer concerned with other matters. It was held that this is hardly a satisfactory explanation, when the authorities are dealing with the liberty of the subject.(1) The detention was, of course, held illegal. In an earlier case, a time limit was fixed for service of grounds after the order of detention, and it was held that the grounds must be served with the least possible delay and twenty-four hours should normally be the time within which the grounds should be served. The period of twenty-four hours was fixed, because otherwise the detenu's right of making a representation would be rendered illusory.(2) But in a case where a reasonably satisfactory explanation was given for delay, the court condoned a delay of two months.(3)

The purpose of requiring the detenu to be furnished with

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(1) Muhammad Aslam Malik v. Province of West Pakistan, P.L.D.1968 Lah. 1324

(2) Ghulam Ullah Khan v. District Magistrate, Campbellpur, P.L.D.1967 Peshwar 195.

(3) Mahbub Anam v. Govt. of East Pakistan, P.L.D.1959 Dacca 774.

grounds and particulars is to enable him to make a representation against the order of detention. The right to grounds is of no value, if the affected person is not given a right of redress, if the grounds do not justify his detention. The representation allowed is against the order of detention, as based on the grounds furnished. This right of representation is valuable, as it is the only method available to a person detained to convince the authority that his detention is unmerited. The right to make a representation does not involve a right to a judicial trial or judicial enquiry by an independent tribunal. This was the view of the majority in Gopalan's case[1] but Fazal Ali, J., expressed the opinion that the right to make a representation must carry with it the right to have the representation properly considered by an impartial person. According to the learned judge, there must, therefore, be some machinery for properly examining cases of detenus and determining whether they have been detained without reason.

The right is not confined to the physical opportunity of using paper and pen. The purpose of the representation is to answer the charges contained in the grounds, so the

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(1) A.I.R. 1950 S.C.27

information conveyed to the detained person must be sufficient to attain that object. The court is entitled to examine the statement of grounds and particulars given to the accused from this point of view and to see whether the statement is sufficient to enable the detenu to make a representation. The regrettable practice of the executive furnishing insufficient details to the detenu to enable him to make a representation against his detention has been deprecated by their Lordships of the Supreme Court time and again. There is no provision in the Constitution for the detenu to be given an oral hearing or to engage a lawyer and to be represented. The representation is however to be made to the Provincial Government in case a person is detained under the Provincial Statute and to the Central Government in case the person is detained under a Central Statute, or if the statute so provides to the officer who made the detention orders.

The executive has power to withhold from the detenu facts which it thinks to be against the public interest to disclose. "In almost every case of detention, the detaining authority, when questioned by the Court about the reasons for detention, mechanically repeats the formula of 'public safety and maintenance of public order' and displays

a positive disinclination to the matter being probed further. While such disinclination is understandable, where high affairs of State are concerned, there is no reason why, in ordinary cases, as for instance where a man is arrested for defying law and order, intending to lead a banned procession, fomenting labour discontent or communal hatred or for otherwise endangering the public peace, the authority ordering the arrest should not take the Court and the public into its confidence by giving a broad hint about the reasons for the action taken. In such cases the Court does not desire to go into details or to ask for disclosure of the material, on which the authority ordering the arrest formed his opinion, except to the extent that such information is relevant to the question whether the action taken was bona fide."(1) When facts are withheld by the executive, the suspicion arises that the detaining authority knows full well the weakness of his case, so, apart from deceiving the Court under the plea of this privilege, it not only irritates the court but brings Government into disrepute. It is suggested that, except where really high confidential matters of state are involved, the executive should voluntarily come forward and give reasons for its action to rebut the suspicion of bad faith.

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(1) Inayat Ullah Khan Mashriqi v. Crown, P.L.D.1952 Lah.331.

A right without a remedy for enforcing it is of little value. A mere declaration of the right and the safeguards would be a formality, if there were no effective means of enforcing it. Article 2 declares that every citizen, wherever he may be and every other person for the time being in Pakistan, has the inalienable right to enjoy the protection of law and to be treated in accordance with law; no action detrimental to the life, liberty, body, reputation or property of any person shall be taken, except in accordance with law; no person shall be prevented from or be hindered in doing what is not prohibited by law and no person shall be compelled to do that which the law does not require him to do. When this right is infringed by a private individual, the person aggrieved must seek the appropriate remedy provided by the ordinary law. But when it is infringed by an official or public authority, a remedy may be sought in the High Court by a writ petition. Article 98 confers jurisdiction on the High Courts to issue orders in the nature of mandamus, habeas corpus, certorari, prohibition and quo warranto. The writ which is appropriate, where the person is deprived of his liberty, is the writ of habeas corpus. Generally the writ of habeas corpus is issued in cases of illegal and improper detention in public or private custody

but the writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty.(1) It is a prerogative process for securing the liberty of the subject, by affording effective means of immediate release from unlawful detention, whether in prison or in private custody. Although the writ of habeas corpus is a writ of right, it is not a writ of course. There are authorities to support the view that, even if a fit case has been made out showing ex facie a want of jurisdiction in the authority making an order of committment, yet if it appears to the court that it is purely technical defect or the conviction is otherwise valid, the Court will not interfere.(2) The writ is only issued when reasonable cause is shown. The writ of habeas corpus is of remedial nature and is not used as an instrument of punishment.(3) The object of the writ is not to punish previous illegality, but to release from previous illegal detention.(4) Habeas Corpus is essentially a writ of inquiry, and upon matters in which the state is itself concerned, in aid of right and liberty, though private

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(1) Rao Mahroz Akhtar v. Dist.Magistrate, P.L.D.1957 Lah.676

(2) Abdul Hannan v. Govt.of East Pakistan, P.L.D.1959 Dacca 279

(3) Barnardo v. Ford Gossage, 1892 A.C.326

(4) R v. Home Secretary, Ex parte O'Brien, (1923) 39 T.L.R.487

rights may be involved. It by no manner of means follows that the prayer of the petitioner will be granted, because the writ has been ordered to issue. The writ simply brings the parties before the Court for the ascertainment of the facts of the case. The Court is clothed with the power, with a sound discretion to grant or refuse relief.(1) In Ghulam Jilani's case(2), the Supreme Court held that, "Power is expressly given by Article 98 to the Superior Court to probe into the exercise of public power by executive authority, how high-soever, to determine whether they have acted with lawful authority. The judicial power is reduced to a nullity, if laws are so worded or interpreted that the executive authority may make what statutory rules they please thereunder and may use this freedom to make themselves the final judges of their own "satisfaction" for imposing restraints on the enjoyment of the fundamental rights of citizens. Article 2 of the Constitution would be deprived of all its content through this process and courts would cease to be guardians of the nation's liberties.

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(1) Nasim Fatima v. Govt. of West Pakistan, P.L.D. 1967 Lah. 103 (F.B)

(2) Malik Ghulam Jilani v. The Govt. of West Pakistan, P.L.D. 1967 S.C.373.

The right of a person to a petition for habeas corpus is a high prerogative right and is a constitutional remedy for all matters of illegal confinement. In all cases where a person is detained and he alleges that his detention is unconstitutional and in violation of the safeguards provided in the Constitution, or that it does not fall within the statutory requirements of law under which the detention is ordered, he can invoke the jurisdiction of High Court under Article 98 of the Constitution of Pakistan and ask to be released forthwith.(1) Though normally the right to a writ under Article 98 is only available in the absence of an adequate alternative remedy when the liberty of a person is involved, the question of adequate remedy does not come into play, in particular in cases of habeas corpus.(2) In a petition for habeas corpus, it is not necessary that the detenu himself should apply; the petition can be moved even by a friend of the person detained illegally. Although under our Constitution there is no scope for successive application for habeas corpus, an application for habeas corpus on fresh grounds can never be barred.

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(1) Farid Ahmad v. Govt. of West Pakistan, P.L.D.1965 Lah.135

(2) Abdul Sabur v. The District Magistrate, P.L.D.1969 Pesh.167

The rejection of a former petition of this nature will not in every case operate as res judicata or have finality. If the Court has determined that on the day of making the order, the person in custody is being lawfully detained, a subsequent petition directed against his continued detention on a date subsequent to the order of the Court, need not involve a review of the earlier order of the Court, nor violate the principle of finality of the earlier judgment of the Court. If the detention is shown to be either unlawful or in an unlawful manner, it is the duty of the Court to release the person in detention and it is no answer to the petition that an earlier petition has been dismissed. The purpose of the Constitution will be defeated, if a second application is not entertained on the technical ground that a former petition has been dismissed.

A technicality cannot stand in the way of releasing a person, who is being detained without lawful authority or in unlawful manner. If the question is to be decided on general principles of public policy, then obviously the Courts must lean in favour of granting the relief rather than refusing it, unless there is a prohibition in the rules or statute, but there is no prohibition on successive application in any rule or statute. The wording of the Constitutional provision

enables a challenge to an order of detention and the Court is authorised to satisfy itself that the person in custody is not detained without lawful authority. This duty the Court must perform. The Court is not relieved of this duty, because a certain ground, or a question of law or fact or a certain reasoning, which could have shown by the order of detention to be unlawful, was not raised or taken before the Court in an earlier petition.(1)

Orders and proceedings in violation of the principles of natural justice are liable to be quashed in the exercise of the jurisdiction under Article 98 of the Constitution. In an emergency it might be necessary for the authorities to take immediate action, when grave danger to the public safety or maintenance of public order or security of the state is involved; in such cases the rules of natural justice may be relaxed, provided they are subsequently observed. Under Section 491 of the Criminal Procedure Code, the High Court also has a power to issue orders in the nature of Habeas Corpus. Article 98 (2)(b)(i) is not a reproduction of Section 491 of the Criminal Procedure Code but the Constitutional provision is of higher authority and is not

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(1) Nasim Fatima v. Govt. of West Pakistan, P.L.D.1967 Lah.103 (F.B.)

subject to the restriction imposed by sub-section (3) of Section 491 of Criminal Procedure Code in respect of persons detained under the Bengal State Prisoners Regulation, 1818, or the Bombay Regulation XXV of 1827 or The State Prisoners Act, 1850, or the State Prisoners Act, 1858; nor do the provision of any other special law like the West Pakistan Maintenance of Public Order Ordinance, 1960, authorising detention and restricting the High Court's power, control this jurisdiction.(1)

The necessity for such legislation arises when personal liberty is abused by individuals who endanger the life and safety of peace loving citizens. President Nyerere emphasised that, "While the vast mass of the people give full and active support to their country and its government, a handful of individuals can still put our nation into jeopardy and reduce to ashes the effort of millions." The need for such legislation arises from the fact that the evidence in possession of the authorities will not be sufficient to support a charge or to secure the conviction of such persons by legal proof.(2) The question may arise whether this

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(1) Muhammad Ali v. Muhammad Bashir, P.L.D.1962 Lah.230

(2) Liversidge v. Anderson, 1942 A.C. 206 (218)

special legislation is necessary when there are so many other enacted laws to ensure peace and order in the Country.

Democracy in our country needs to be guarded more carefully than in the West, where the countries have a long history of established democratic principles. Those who know the conditions prevelant in our country will agree that a relatively small number of political agitators can create a large amount of unrest and endanger the security of the country, and the maintenance of public peace and order. There are certain provisions in the Criminal Procedure Code and Pakistan Penal Code, the object of which is the prevention and not the punishment of the offences. These provisions are insufficient to meet the needs of the country to maintain law and order. The reason is that the ordinary criminal laws, with their historic safeguards, designed to produce a fair trial before conviction, are inadequate and cannot be made adequate to meet the emergencies with which the Pakistan Government is faced. To borrow the words of Professor Alan Gledhill, "Preventive Detention is an administrative necessity and likely to cause less human misery than might result from likely alternative measures to deal with persons who cannot be successfully prosecuted for their activities, though they are a menace to public security and order."(1)

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(1) Alan Gledhill, Fundamental Rights in India 1955 p.126

The law of preventive detention has been much criticised by judges, lawyers and the politicians. The judges denounce the idea of preventive detention in normal times. Mahajan J. said, "Preventive detention laws are repugnant to democratic institutions and they cannot be found to exist in any of the democratic countries of the world." Kania, C.J. observed that, "It may be noticed that neither the American nor the Japanese constitution contain provisions permitting Preventive Detention .... Preventive detention in normal times i.e; without the existence of an emergency like war, is recognised as a normal topic of legislation under our constitution." Mukherjea J. commented that, "No country in the world that I am aware of has made this (Preventive detention) an integral part of their constitution as has been done in India .... This is undoubtedly unfortunate ... which cannot but be regarded as a most unwholesome encroachment upon the liberties of the people."(1) The Bar Council of Pakistan has always criticised it and in a resolution passed at its 19th Session, resolved that, "In times of peace, there should be no preventive detention without trial, as such detention deflects from the concept of the rule of law, to which Pakistan and this council firmly adhere .."(2)

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(1) Gopalan v. State of Madras, A.I.R.1950 S.C.27

(2) Resolution of the Pakistan Bar Council held in Chittagong on Sept. 26-29 (69).

Commenting on the report published by Amnesty International (U.K.), the Times[1] in the editorial wrote, "the Governments that detain them plead the security of the state, some with more justification than others. Most of these detentions are disgraceful, certainly disqualifying the countries concerned from being called democracies. It is a sad comment on new nations that, with around 130 in all, no more than a score pass the first test of political freedom."

The criticism of preventive detention may be classified under three heads, first preventive legislation itself, second the constitutional recognisation given to it and lastly the procedure attached to it.

It is clear that we are not the only country to have this sort of legislation during the peace time; there are other countries in this category. What I think worries the legal conscience is not the legislation itself but the constitutional status given to it and the procedure. The constitution can of course be amended, if the will of the people is there. The amendment clause is there to meet this need. As regards the procedure, this really should be changed, to bring it as far as possible in line with the established principles of rule of law, of course recognising that Government, which has to

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(1) The Times (London) December 24, 1968.

deal with persons determined to undermine the safety, the security and the defence of the State. The power of detention without trial should be limited to a period of three months only and if the period exceeds three months, it should be with the consent of the Advisory Board and the maximum period of detention should under no circumstances be more than one year.

Another fundamental question, which disturbs the opposition, is the abuse of the power of preventive detention vested in the Government. The claim of the opposition is that it is not for the security of the State that the Government wants to arm itself with such legislation, but to continue in power, by keeping active members of the opposition behind bars on some pretext or other. On this point, it is submitted that whatever may be done, there will always be a chance of this power being abused, whether intentionally or innocently. It is only the courts, which can rescue the innocent victim of misuse of power by insisting that the various safeguards provided in the Constitution are complied with.

There is no firm indication of when we will get rid of this black spot in our Constitution, the reason being that there are so many political parties[1] in Pakistan;

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(1) There are at least twelve political parties now in Pakistan.

they have no common platform and the political leaders have made Pakistan a battlefield of conflicting ideas and ambitions. So long as this situation continues, preventive detention will remain, as it is essential to save the country from politicians who abuse their position and power. The numerous political parties not only cause trouble to the State and the peace loving citizens, but they create trouble for themselves, by making accusations and counter accusations and they do nothing for the benefit of the nation as a whole. It can only be prayed that one day these parties will unite into two or three parties and will be in a position to consider with cold minds how preventive detention legislation can be dispensed with.

The people's frustrations are economic and arise largely from the unequal distribution of wealth. Selfish leaders, by suggesting political solutions for economic problems, have been curiously successful in diverting the attention of the people from the main issues and problems. To keep themselves popular among illiterate people and to retain leadership, they have fomented regional prejudice and sponsored agitation to achieve their ends by unconstitutional means. The need for Preventive Detention will remain, until the leaders and the people adopt democratic ways of demonstrating their grievances.

To sum up, the citizens of Pakistan were not merely promised personal liberty but concrete rights have been conferred on them, subject to reasonable restrictions in the interest of the security, the defence of Pakistan and the maintenance of public order and peace. The restrictions on the liberty of the person gave birth to the law of preventive detention, with certain safeguards embodied in the Constitution. These constitutional safeguards become paper safeguard, if the courts do not enforce them.

Notwithstanding the limited jurisdiction given to the courts and the wide discretion given to the executive, the court can effectively intervene to ensure that the authority acts honestly, follows the set legal procedure and makes available to the detenu the procedural safeguards. The courts have not hesitated to release a detenu on a writ of habeas corpus in the event of any improper exercise or abuse of legal procedure and discretion. So long as this black spot remains in our Constitution, it is only the Courts that can influence the liberalisation of preventive legislation in favour of detenu.

Finally it is suggested that :-

(1) Preventive detention should be enforced only in imminent and real necessity,

(2) a liberal construction should be given to preventive detention legislation in favour of detenu,

(3) the discretion of the executive to detain a person without trial should be limited to a period of three months without the consent of the Advisory Board, except during a national emergency like war,

(4) there should be no detention beyond three months without the consent of Advisory Board and the maximum period of detention should not exceed one year in any event during peace time,

(5) the number of the members of the Advisory Board should not be less than three in any circumstances; two should be persons qualified to be appointed as judges of the superior courts,

(6) grounds of detention should be disclosed in full, unless there is emergency like war or high official secrets of the state are involved.

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